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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

SAVE THE DUNES COUNCIL, INC.,

and *Petitioner*

UNITED STATES OF AMERICA,

Respondent

v.

36.96 ACRES OF LAND, MORE OR LESS, SITUATED IN THE COUNTY OF LAPORTE, STATE OF INDIANA, AND NORTHERN INDIANA PUBLIC SERVICE COMPANY,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Where an environmental organization has been closely and continuously involved in the efforts to acquire a particular parcel of land for inclusion in a national park and the government initiates suit to condemn this land for the park under specific Congressional mandate, can the environmental organization be denied intervention when the government attempts to dismiss the case despite the fulfillment of all statutory conditions for acquisition on the ground that the organization does not have a specific legal interest in or power over the property?

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The decision of the U.S. Court of Appeals for the Seventh Circuit, affirming the order of the District Court denying intervention, is reported at 754 F.2d 855 (7th Cir. 1985). A copy of that decision, entered February 22, 1985, is attached in the Appendix of this petition at A1.

The decision of the U.S. District Court for the Northern District of Indiana, Hammond Division, denying intervention to Save the Dunes Council is reported at 100 F.R.D. 78 (N.D. In. 1983). A copy of the decision, entered on December 8, 1983, is attached in the Appendix of this petition at A14.

JURISDICTION OF THIS COURT

The judgment of the U.S. Court of Appeals for the Seventh Circuit was entered on February 22, 1985. Save the Dunes Council's Petition for Rehearing was denied by corrected order of a majority of the Seventh Circuit panel on April 4, 1985. Jurisdiction is conferred on this Court by 28 U.S.C. §1254(1).

STATUTES AND RULES INVOLVED

The section of the Indiana Dunes National Lakeshore Act which provides for condemnation of the parcel at issue in this suit, 16 U.S.C. §460u-12, as amended, states:

> The Secretary shall acquire the area on the map referred to in section 460u of this title as area III-B within two years from the effective date of this section only if such area can be acquired for not more than $800,000, exclusive of administrative costs of acquisition, as adjusted by the Consumer Price Index: *Provided*, that the Secretary may not acquire such area by any means after two years from the effective date of this section.

Rule 24(a) of the Federal Rules of Civil Procedure states:

> Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

STATEMENT OF THE CASE

I. Nature of the Case

This case involves the application of Rule 24 Fed. R. Civ. P. to the motion of Save the Dunes Council, Inc. ("Council") to intervene in a condemnation proceeding brought by the United States to acquire 36.96 acres of land already within the authorized boundaries of the Indiana Dunes National Lakeshore ("National Lakeshore"). The parcel is presently owned by Northern Indiana Public Service Company ("NIPSCO"). The condemnation action is grounded in 16 U.S.C. §460u-12, as amended, which directs the Secretary of the Interior to complete the eastern boundary of the National Lakeshore by acquiring this parcel of land, commonly known as Crescent Dune, subject to a spending limit and a two-year deadline, after which the property may not be acquired "by any means." The Council moved to intervene to prevent dismissal of the action by stipulated agreement between the government and NIPSCO despite the fulfillment of all statutory prerequisites. Its motion has been denied by both the District Court for the Northern District of Indiana and the Seventh Circuit Court of Appeals on the ground that the Council's interest as an environmental organization dedicated to preservation and protection of the National Lakeshore is not an "interest relating to the property or

transaction which is the subject of the action" under Rule 24(a).

II. Statement of Facts

The Council was formed in 1952 by a group of citizens concerned about encroachments from industrial expansion around the Indiana Dunes, a complex of giant moving dunes, woodlands and marshes on the southern shore of Lake Michigan. (A49). The Council incorporated as a non-profit organization under the laws of the state of Indiana for the purpose of preserving and protecting the Indiana Dunes for public use and enjoyment, and today it has approximately 2,000 members, many of whom reside in Northern Indiana. (A33). Members of the Council participate in activities at the National Lakeshore on a regular basis. (A34).

The efforts of the Council to secure national protection for the Indiana Dunes began in 1958 when the first bill to preserve the area through the National Park System was introduced into the United States Senate. (A37). These efforts culminated in the addition by Congress of significant parts of the remaining Dunes to the National Park System in 1966 (A37), making it one of the earliest urban national parks. (A49). Since many unspoiled natural areas had not been included in the initial boundaries of the National Lakeshore, the Council submitted a proposal in 1971 for enlargement of the Park to include these areas. (A37). This proposal formed the basis for a series of National Lakeshore expansion bills introduced in Congress between 1971 and 1976. (A37). The proposal and each bill included the "Crescent Dune" tract at issue in the present case. (A37).

"Crescent Dune" is a triangular tract at the eastern extreme of the National Lakeshore. (A47). This parcel has significance to the National Lakeshore out of proportion with its relatively small size since it contains saddle-shaped dunes, 80 feet high, which serve as an important buffer between the NIPSCO power plants to the east and the fragile Mt. Baldy dune to the west. (A47). (*See also* United States Memoran-

dum in Response to Objections at A28). Mt. Baldy is a major scenic attraction in the National Lakeshore.

During the consideration of these bills, the Council actively participated in every hearing concerning the expansion of the National Lakeshore (A38), testifying specifically in support of the inclusion of the Crescent Dune parcel. (A38). The Council also prepared a number of maps of the proposed additions, the last of which was used as the official boundary map for the National Lakeshore expansion bill ultimately passed by the Congress in 1976. (A38). This bill included a provision directing the acquisition of Crescent Dune which is codified at 16 U.S.C. §460u-12. (A39).

Those portions of the National Lakeshore expansion bills authorizing acquisition of the Crescent Dune parcel were continuously objected to by the Department of the Interior (A38), the agency which would have ultimate responsibility for carrying out the mandate of Congress. Since the passage of the National Lakeshore expansion bill, the Council closely followed the progress of the acquisition of Crescent Dune due to its high natural value, specific conditions of acquisition, lack of support for the acquisition shown by the Department of Interior (A39) and previous dilatory performance by the Department in making acquisitions for the National Lakeshore under the original act. (A40).

III. Summary of the Proceedings

On August 4, 1978, just within the two-year deadline for acquisition, the Secretary of the Interior filed suit in the United States District Court for the Northern District of Indiana for condemnation of the 36.96 acre tract specified in 16 U.S.C. §460u-12. Jurisdiction was conferred on the District Court pursuant to 28 U.S.C. §1345 and §1358. According to the government's complaint for condemnation, the parcel was "required for the proper administration, preservation, and development of the Indiana Dunes National Lakeshore." (A22). The only defendant contesting the condemnation,

NIPSCO, filed its objections to condemnation on September 25, 1978.

No further action was taken until October 9, 1981 when the District Court set trial for February 8, 1982. Then, in response to NIPSCO's objections to condemnation, the United States filed a memorandum on December 21, 1981 stating that all prerequisites for condemnation under 16 U.S.C. §460u-12 had been met. (A27-A32).

Upon learning in early 1982 that the trial date had been postponed indefinitely (A39), the Council moved to intervene as plaintiff under Fed. R. Civ. P. 24 (A33-A35). The United States made no independent response to the Council's motion to intervene. 100 F.R.D. 78 at 80 (N.D. In. 1983). The hearing date for the motion was set for September 7, 1983 but was postponed on that same date when NIPSCO and the United States, in unexplained collaboration, submitted a stipulation and joint motion to dismiss the condemnation action stating that the "interests . . . are no longer required by the plaintiff." (A50-A51).

On December 8, 1983, District Court Judge Allen Sharp denied the Council's motion to intervene, both of right and permissively. In applying the requirements of Rule 24(a), the District Court found that the Council's intervention was timely because, until 1982

> the Council had no reason to believe that intervention would be required to protect its alleged interest in the tract of land since condemnation of the NIPSCO property would seem to effectuate the intent of Congress as manifested in a series of National Lakeshore expansion bills, all of which included the area at issue in this case.

100 F.R.D. 78 at 80. However, the District Court went on to find that because the Council did not claim an ownership interest in the property at issue, it "has no protectable interest that can be impaired." 100 F.R.D. at 81.

The Council appealed the District Court's denial of intervention to the United States Court of Appeals for the Seventh Circuit pursuant to 28 U.S.C. §1291. The Court of Appeals, over a sharp dissent by Judge Cudahy, affirmed both the District Court's decision and its reasoning that a specific interest in the property is required for intervention of right under Rule 24. The Court of Appeals asserted that condemnation proceedings involve only two "legal" interests, that of the sovereign and that of the private owner, neither of which had been claimed by the Council. 754 F.2d 855 at 858 (7th Cir. 1985). Moreover, the majority below held that the "aesthetic and environmental interest" asserted by the Council, although "legitimate and demonstrable," is not "direct, substantial, or legally protectable . . . not the type of interest which justifies intervention under Rule 24(a)." 754 F.2d at 859.

Rejecting the legal interest approach of the majority as "myopic" and "unsupported by any authority," 754 F.2d at 860, the dissent argued that the environmental interest represented by the Council is at the heart of the case and that its standing to represent that interest should constitute sufficient interest under Rule 24, especially where denial of intervention would preclude judicial consideration of issues of public interest. 754 F.2d at 861. The dissent also found the inadequacy of representation "appallingly clear", adding:

> With all respect, this case may involve, though we cannot really know, a flouting of the public interest in conservation and in preservation of unique natural resources. Only by allowing participation in this proceeding by an organization of proven commitment not only to conservational values in general but to the Indiana Dunes in particular can the public interest in these natural treasures be protected.

754 F.2d at 862.

The Council's petition for rehearing was denied by a majority of the Court of Appeals on April 4, 1985. (A13).

REASONS FOR GRANTING THE WRIT

I. The denial of intervention of right by the majority below on the basis of inadequate "interest" is contrary to the decisions of this Court, the policy of Fed. R. Civ. P. 24(a) and the decisions of other circuits interpreting that rule, and it will substantially undermine the ability of members of the affected public to seek judicial review of government action which frustrates a clear Congressional mandate to protect a local environment of national interest.

For intervention of right under Rule 24(a), the potential intervenor must show timely application, an interest relating to the property or transaction which is the subject of the action, that the disposition of the action may as a practical matter impair or impede its ability to protect that interest, and that the interest is not adequately represented by existing parties. Fed. R. Civ. P. 24(a). The decision of the majority below denying Save the Dunes Council's right to intervene in acquisition proceedings for the National Lakeshore, which would otherwise be terminated by the government plaintiff, was based upon its finding that the Council lacked sufficient "interest" in the property at issue to justify intervention under Rule 24(a). Thus, the Council was found to have failed the second part of the four-part intervention of right requirement.[1]

The majority finding of insufficient interest had two premises. First, the majority states that an eminent domain proceeding includes "only two legal interests" — that of "the sovereign" and that of the private owner, 754 F.2d at 858, neither of which have ever been asserted by the Council. Second, the majority asserted that the aesthetic and environmental interest of the Council, admittedly sufficient to seek judicial review under *Sierra Club* v. *Morton*, 405 U.S. 727 (1972), is not a significantly protectable interest for the pur-

1. The finding of the District Court that the Council had fulfilled the timeliness requirement of 24(a) was not contested on appeal. 754 F.2d at 857 n.1.

poses of intervention of right. 754 F.2d at 859. Lacking "legal" interest in the property, the Council was found to have no other legally protectable interest to warrant intervention. Moreover, neither the serious impairment of the interest asserted by the Council if intervention were denied nor the inadequacy of existing representation which the dissent found "appallingly clear," 754 F.2d at 862, were addressed by the majority.

This Court has twice addressed the nature of the interest required for intervention of right under amended Rule 24. In *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129 (1967), this Court held that those directly affected by a pending merger, the primary utility customers, and a major competitor were entitled to intervene to challenge the merger agreed to by the government plaintiff as inconsistent with an earlier divestiture order. By both its holding and express statement, the Court made clear that intervention of right was not limited to those with a "legal" interest in the property at issue. *See* 386 U.S. at 133. The decision in *Donaldson* v. *United States*, 400 U.S. 517 (1971) (Blackmun, J.), denying intervention of right to a taxpayer in an IRS investigatory proceeding against a third party, is not in any way inconsistent with *Cascade* but rather represents the application of Rule 24 in an entirely different context. *Donaldson* held that a mere interest in enforcing procedural technicalities to delay administrative processes was insufficient to justify intervention of right, stating that "what is obviously meant [by Rule 24] is a significantly protectable interest." 400 U.S. at 531.

However, the majority below, without ever referring to the *Cascade* decision despite its being analogous to the present case, construed "significantly protectable" to require intervenors to have a legal interest in, or power over, the property at issue. Thus, where "the sovereign" has exercised its condemnation power, as here, but its agent refuses to carry out the mandate, all other potential parties, no matter what

their relationship to the subject property, are excluded from preventing actions which will frustrate the Congressional mandate to acquire the property. Such an approach is directly at odds with this Court's decision in *Cascade*, the purpose of Rule 24(a), and the *Sierra Club* decision broadening the interests entitled to seek judicial review of executive actions with respect to public resources.

Since the *Donaldson* decision this Court has not addressed the issue of the interest required for intervention of right, and no clear consensus has emerged from the conflicting approaches to the issue taken by the courts of appeals. *See* C. Wright & A. Miller, Federal Practice and Procedure §1908 (1972). However, no other court of appeals has held that an environmental interest is in itself "not the type of interest which justifies intervention under 24(a)." 754 F.2d at 859. Rather, the courts of appeals have denied intervention on the ground of insufficient interest only where the interest asserted is purely procedural,[2] a contingent economic inter-

2. *United States* v. *City of Jackson, Miss.*, 519 F.2d 1147 (5th Cir. 1975) (maintenance of class action).

est,[3] or a matter of general policy concern.[4] In nearly identical circumstances with the present case, the Ninth Circuit has taken a position directly contrary to that of the majority below, holding that an environmental organization closely involved with the establishment of a federal conservation area is entitled to intervene in a challenge to federal ownership where the representation by the federal entity is potentially inadequate, despite the organization's lack of specific legal interest in the property. *Sagebrush Rebellion, Inc.* v. *Watt*, 713 F.2d 525 (9th Cir. 1983).

Moreover, the construction of Rule 24(a) by the majority below will allow government entities under clear mandate from Congress both to avoid responsibilities under that mandate and prevent judicial intervention to remedy their violation of duty. The only way that the public interest in the Crescent Dune property can be protected, as declared by

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3. *Hawaii-Pacific Venture Capital Corp.* v. *Rothbard*, 564 F.2d 1343 (9th Cir. 1977) (collectibility of subsequent judgments); *Blake* v. *Pallan*, 554 F.2d 947 (9th Cir. 1977) (integrity of state securities laws referenced to federal laws at issue in the action); *Meridian Homes Corp.* v. *Nicholas W. Prassas & Co.*, 683 F.2d 201 (7th Cir. 1982) (Cudahy, J.) (owners of interest in joint venture profits in suit to terminate joint venture); *New Orleans Public Service, Inc.* v. *United Gas Pipe Line Co.*, 732 F.2d 452 (5th Cir. 1984) (*en banc*), *cert. denied*, 105 S.Ct. 434 (1985) (overcharge to consumers in suit between gas supplier and utility); *Crown Financial Corp.* v. *Winthrop Lawrence Corp.*, 531 F.2d 76 (2d Cir. 1976) (lien on property not closely related to the present action); *Rosebud Coal Sales Co.* v. *Andrus*, 644 F.2d 849 (10th Cir. 1981) (private lease referenced to royalty rate in federal lease at issue).

4. *Allard* v. *Frizzell*, 536 F.2d 1332 (10th Cir. 1976) (environmental groups' interest in challenge to bird protection legislation as applied to Indian artifacts not differentiated from general public); *United States* v. *Perry Co. Bd. of Educ.*, 567 F.2d 277 (5th Cir. 1978) (interest of parents in desegregation action based on policy concerns, not deficiency of remedial order); *Athens Lumber Co., Inc.* v. *Federal Election Comm'n*, 690 F.2d 1364 (11th Cir. 1982) (union interest in corporation's challenge to campaign contribution limitations based on policy concerns); *Westlands Water Dist.* v. *United States*, 700 F.2d 561 (9th Cir. 1983) (national environmental group's interest in water contract dispute based on concerns for efficient water rights policy).

Congress and the federal plaintiff itself until 1983, is by condemnation which can be initiated and carried out only by the federal agency to whom Congress has delegated the duty. When the agency fails to carry out the mandate, intervention by those with a close relationship to the subject of the action is the most effective means of preventing dismissals which foreclose judicial review and frustrate clear Congressional directives.[5] Rarely does a group such as the Council have a "legal" interest in the property which it seeks to preserve in the public interest. Yet, to state that it has *no* interest relating to the property or transaction which is the subject of the action is to revert to harsh formalisms long-abandoned in the modern legal system. Such formalisms are contrary to common sense, flatly inconsistent with principles well-established since the *Sierra Club* decision, and severely detrimental to protection of the public interest in unique natural treasures.

A. The decision of the Seventh Circuit majority denying intervention to Save the Dunes Council on the basis of inadequate "interest" is in fundamental conflict with this Court's decisions on intervention and standing.

For intervention of right under Fed. R. Civ. P. 24(a)(2), the prospective intervenor must show that it has an interest relating to the property or transaction which is the subject

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5. The mandamus remedy noted by the majority below, 754 F.2d at 860, is highly unlikely to be an effective alternative to prevent serious impairment of the Council's interest from the disposition of the condemnation action. First, given the precise conditions for acquisition under the statute, the pending stipulation and joint motion to dismiss if granted may well operate to bar later acquisition of Crescent Dune "by any means." *See* 16 U.S.C. §460u-12. Second, the past conduct of the Secretary of the Interior — the consistent opposition to acquisition of Crescent Dune (A38) and the attempt to dismiss the action on the basis of the bald assertion that the area is simply "no longer required by the plaintiff" (A50) and despite the government's own acknowledgement that the conditions set upon the statutory mandate have been fulfilled (A27-A32) — demonstrates that nothing short of direct intervention in the present proceeding will assure that Crescent Dune is acquired for public use as intended by Congress.

matter of the action. This Court has held that an "interest" sufficient for intervention under 24(a) must be "significantly protectable," *Donaldson* v. *United States*, 400 U.S. 517, 531 (1971), construed in light of the purpose of the intervention, the degree to which the public interest is involved, and the inadequacy of current representation, *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129, 135-36 (1967). Moreover, it has been well-established by this Court that ecological, aesthetic and recreational values are significant interests protected by the legal system, so long as they are asserted by those actually affected by the environmental deterioration. *Sierra Club* v. *Morton*, 405 U.S. 727 (1972); *United States* v. *SCRAP*, 412 U.S. 669 (1973); *Duke Power Co.* v. *Carolina Environmental Study Group*, 438 U.S. 59 (1978).

This Court has twice addressed the nature of the interest required for intervention under Rule 24(a)(2). The majority below referred to only one of those decisions, isolating the "significantly protectable interest" language in *Donaldson* and construing it to require more than the Council's acknowledged "legitimate and demonstrable" interest which is legally protectable under *Sierra Club*. 754 F.2d 855 at 859. Indeed, the Court below held that "aesthetic and environmental" interests are not "direct, substantial, or legally protectable" under *Donaldson* and thus "not the type of interest which justifies intervention under Rule 24(a)." 754 F.2d at 859.

The majority below entirely ignored this Court's decision in *Cascade* which held that the State of California, a competitor, and a major industrial user were entitled to intervene in an antitrust suit to protect their interests against the lack of diligence by the plaintiff, the United States, in pursuing the divestiture mandate. The limitation of the "interest" entitling intervention to an interest in the property of the proceeding was expressly rejected. 386 U.S. at 133. Instead, the interest required was assessed in light of the public interest in the proceeding, the position of the intervenors as representatives of the intended beneficiaries of the original action, the

inadequacy of representation, and the clarity of the mandate to be implemented. 386 U.S. at 134-36. These factors are also present and substantial in the circumstances in which the Council has attempted to intervene, yet have been entirely ignored due to the requirement of the majority below that the Council show a legal interest in the property at issue.

The requirement of the majority below that intervenors of right have a legal interest in the property at issue stems from its exclusive reliance on and misinterpretation of the *Donaldson* decision. The holding in *Donaldson* did not overrule *Cascade* by requiring a "significantly protectable" interest, but rather is consistent with it. The "significantly protectable interest" required in *Donaldson* served to distinguish such an interest from the one asserted by the taxpayer in that case which was merely to make IRS investigative procedures more difficult. 400 U.S. at 531. Concerning the taxpayer's attempt to prevent production of records by intervening in an IRS summons proceeding against a former employer, the Court stated:

> The nature of the "interest" urged by the taxpayer is apparent from the fact that the material in question (once we assume its relevance) would not be subject to suppression if the Government obtained it by other routine means . . . This interest cannot be the kind contemplated by Rule 24(a)(2) when it speaks in general terms of "an interest relating to the property or transaction which is the subject of the action." What is obviously meant there is a significantly protectable interest.

Id. The decision did not narrow the interests entitling intervention to interests in the property of the proceeding. In contrast to *Donaldson*, the Council does not claim an interest in delaying government litigation by the assertion of procedural technicalities. Rather, similar to the intervenors in *Cascade*, the Council has a substantive interest in the protection of the National Lakeshore which is greatly impaired by the

failure of the federal plaintiff in carrying out a clearly expressed and specific Congressional mandate.

The use of the "significantly protectable" standard to deny that environmental and aesthetic interests are sufficient for intervention where asserted by those directly affected is not only a misapplication of *Donaldson* but also fundamentally inconsistent with *Sierra Club* v. *Morton*, 405 U.S. 727 (1972), decided a year later. In *Sierra Club* and subsequent decisions, *United States* v. *SCRAP*, 412 U.S. 669 (1973), *Duke Power Co.* v. *Carolina Environmental Study Group*, 438 U.S. 59 (1978), this Court has firmly established the principle that noneconomic interests, specifically those involving the environment and conservation, are fully recognized and protected by the legal system. The Seventh Circuit decision to the contrary, that environmental interests are not "significantly protectable" in the context of this case, must be reversed.

B. The decision of the Seventh Circuit majority is in conflict with the interpretations of Rule 24(a) by other circuits which have confronted the issue of the "interest" required for intervention of right.

None of the courts of appeals which have addressed the issue of "interest" under Rule 24(a) have taken the approach adopted by the majority below of focusing on "interest" as the determinative criterion for intervention and of using the "significantly protectable" standard to deny intervention to persons asserting injuries without legal power over the property at issue. Moreover, the interpretation of Rule 24(a) by the majority below is contrary to the 1966 amendment to Rule 24 which eliminated the property interest requirement for intervention of right in favor of a more functional and equitable approach.

No other court of appeals has denied intervention of right on the ground that nonproperty interests are not "significantly protectable" under modern Rule 24(a). Rather, the inquiry into "interest" has been similar to a standing analy-

sis: whether the impact on the potential intervenor due to the outcome of the proceeding is different from an interest asserted by the public at large. *Natural Resources Defense Council, Inc.* v. *United States Nuclear Regulatory Comm'n*, 578 F.2d 1341, 1344 (10th Cir. 1978) (interest requires threat different from that of general public's interest in the matter); *Westlands Water Dist.* v. *United States*, 700 F.2d 561, 563 (9th Cir. 1983) (national environmental group not entitled to intervene in water contract dispute where sole interest is concern for enlightened public water use policy); *United States* v. *American Telephone & Telegraph Co.*, 642 F.2d 1285, 1291 (D.C. Cir. 1980) (interest required for intervention of competitor to contest discovery order is "in essence" an issue of standing to participate); *NYPIRG* v. *Regents of Univ. of New York*, 516 F.2d 350, 351-52 (2d Cir. 1975) (pharmacists have sufficient interest to intervene as beneficiaries of drug regulation challenged).[6]

Following the decision in *Cascade*, these courts have also emphasized that the issue of interest is not to be viewed in isolation from the nature of the impairment and the inadequacy of representation. *United States* v. *Hooker Chemicals & Plastics Corp.*, 749 F.2d 968, 983 (2d Cir. 1984) (Friendly, J.) (application of 24(a) requires "that its components be read not discretely but together."); *Natural Resources Defense Council*, 578 F.2d at 1345, (10th Cir. 1978) (the "question of impairment is not separate from the question of existence of an interest."); *Smuck* v. *Hobson*, 408 F.2d 175, 179 (D.C. Cir. 1969) (*en banc*) (intervention analysis under 24(a) should not be led astray by a "myopic fixation upon 'interest' " but

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6. The standing analysis for intervention was followed by this Court in *Bryant* v. *Yellen*, 447 U.S. 352 (1980), affirming the holding of the court of appeals that residents of a reclamation district were entitled to intervene in a suit brought by the United States where it had refused to appeal from an adverse judgment. 447 U.S. at 367-68.

rather should rely primarily upon determination of impairment and inadequacy of representation.)[7]

Although no clear consensus has emerged in the courts of appeals concerning what specifically constitutes an "interest" for the purposes of Rule 24(a), C. Wright, Law of Federal Courts at 503 (4th ed. 1983), intervention of right has been denied on the basis of insufficient interest in the property or transaction only in three types of circumstances. Following *Donaldson*, the courts of appeals have denied intervention of right where the only interest claimed was procedural in nature. *See United States* v. *City of Jackson, Miss.*, 519 F.2d 1147 (5th Cir. 1975) (maintenance of class action). The courts of appeals have also denied intervention where the interest asserted was an indirect economic effect or a matter of general concern undifferentiated from the interest of the public at large. *See* cases cited at footnotes 3 and 4, *supra*.

Furthermore, the Ninth Circuit has encountered the issue of "interest" in contexts nearly identical to the case before the majority below. That Circuit summarily rejected the contention that noneconomic injuries asserted by a public interest group substantially involved in the specific subject matter at issue do not rise to the level of "interest" sufficient for intervention under 24(a). *Washington St. Bldg. & Constr. Trades Council* v. *Spellman*, 684 F.2d 627 (9th Cir. 1982), *cert. denied* 461 U.S. 913 (1982) (public interest group which sponsored initiative on radioactive waste entitled to intervene in suit challenging the initiative); *Sagebrush Rebellion, Inc.* v. *Watt*, 713 F.2d 525 (9th Cir. 1983) (National Audubon

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7. One of the most frequently cited opinions concerning the interest requirement of 24(a) is *Nuesse* v. *Camp*, 385 F.2d 694 (D.C. Cir. 1967) (Leventhal, J.), in which a state bank commissioner was entitled to intervene in an action of a state bank against the U.S. Comptroller of Currency. In explicitly rejecting the requirement that the intervenor must show a specific legal or equitable interest, the Court stated that "in the intervention area the 'interest' test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." 385 F.2d at 700.

Society entitled to intervene in suit challenging establishment of national conservation area despite lack of legal interest in the property where group had been active in promoting the establishment); *Idaho* v. *Freeman*, 625 F.2d 886 (9th Cir. 1980) (National Organization for Women entitled to intervene in suit by states challenging ERA ratification procedures due to active involvement in the ratification). The interest required is not proprietary but substantive and specific, distinguishable from policy concerns of the general public, and thus the inquiry into "interest" is closely akin to a standing analysis. This is also the approach accepted by the dissent below. *See* 754 F.2d at 861.

The decision of the majority below that only two legally protectable interests are involved in the condemnation of land for a national park, interests limited to direct legal power over the property, sharply conflicts with the purpose of the 1966 amendment to Rule 24. The former rule provided for intervention of right only where the petitioner would be legally bound by the judgment and inadequately represented or would suffer adverse effects to an interest in the property involved in the suit. *See* 7A C. Wright & A. Miller, Federal Practice and Procedure §1903 (1972). The central purpose of the 1966 amendment to the rule was to remove the artificial limitation to "property" interest (" . . . interest *relating* to the property *or transaction* . . . ") (emphasis added) and in general to allow intervention where there are practical, not just legal, effects. *Id.* §1908 at 514. *See also Id.* §1903 at 471, quoting from the Advisory Committee Note to the 1966 Amendment to Rule 24 ("If an absentee would be substantially affected in a practical sense by the determination in an action, he should, as a general rule, be entitled to intervene . . . ")

The majority's reliance on the Council's lack of specific legal interest in the property at issue is in direct conflict with the spirit of amended Rule 24 and the decisions of the other courts of appeals to the contrary. These courts have held that "interest," whether of a property or nonproperty nature, is a

function of standing in relation to the subject matter at issue. That authority should prevail and the Seventh Circuit decision below should be reversed.

C. The denial of intervention by the majority below on the ground of inadequate "interest" threatens to preclude judicial review of government action which is contrary to an express Congressional mandate to acquire specific land for a national park.

This Court has recognized the importance of intervention by beneficiaries of Congressional mandates in situations, similar to the condemnation proceedings here, in which they must rely on the federal government to carry out the will of Congress and that reliance is misplaced. *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129 (1967) (intervention by beneficiaries of a divestiture order in federal antitrust litigation); *Trbovich* v. *United Mine Workers of America*, 404 U.S. 528 (1972) (intervention by union member as plaintiff in government suit to set aside union election).[8] In addition, intervention will be granted where the intervenor has standing to represent threatened important public interests and where judicial review will otherwise be precluded. *Cascade*, 386 U.S. 129; *United States* v. *Imperial Irrigation Dist.*, 559 F.2d 509 (9th Cir. 1977) *rev'd on other grds, sub nom. Bryant* v. *Yellen*, 447 U.S. 352, 366-68 (1980) (specifically affirming intervention issue) (district residents entitled to intervene and appeal as plaintiffs where original plaintiff, the United States, refused to appeal adverse judgment on acreage limitations of the Reclamation Act); *United States* v. *First Nat'l Bank & Trust Co. of Lexington, Ky.*, 280 F.Supp. 260 (E.D. Ky. 1967) *aff'd* 391 U.S. 469 (1968) (*per curiam*) (competitor and shareholders entitled to intervene in opposi-

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8. *Cf. Donaldson* v. *United States*, 400 U.S. 517 (1971), in which the taxpayer sought to intervene in IRS proceedings against a third party where there were no major issues of public interest and where the taxpayer had no substantive interest to be protected and alternative means of protecting any interest he did have.

tion to antitrust settlement); *United States* v. *Simmonds Precision Products, Inc.*, 319 F.Supp. 620 (S.D.N.Y. 1970) (union entitled to intervene for purpose of opposing entry of consent judgment in antitrust suit).[9]

The opinion of the majority below that a local environmental organization with unchallenged, long-standing and intense involvement in the land at issue does not have a direct, substantial, or legally protectable interest because the group has no legal power with respect to the property threatens to preclude judicial review of government action detrimental to the environment and contrary to Congressional intent. The importance of intervention to organizations concerned with environmental protection cannot be overestimated. The ability to intervene in government litigation is critical for two reasons. First, the implementation of environmental protection measures almost always requires the institution of proceedings by the federal government, and the results of government conduct may be contrary to Congressional intent to provide critical environmental protection. Second, if the government should fail to pursue the litigation diligently, judicial consideration of the merits may be precluded.

It is true as found by the majority below that the Council has no legal power with respect to the Crescent Dune property since it has neither an ownership interest nor condemnation power. Thus, it must rely on the federal government to institute condemnation proceedings to acquire the property for the National Lakeshore as required by Congress. However, condemnation is the exclusive means by which the Council can effectively protect its interest, and that of the public, in the part of the National Lakeshore environment at issue. The lack of legal power and the exclusiveness of the proceeding are precisely the reasons why intervention is

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9. In *Hobsen* v. *Hansen*, 44 F.R.D. 18 (D.D.C. 1968) where the "direct, substantial and legally protectable" standard relied upon by the majority below was first formulated, the court allowed intervention of parents for the purposes of appeal of important desegregation issues.

essential for protecting the public interest where representation by the government has become inadequate. *See Cascade*. In addition, the denial of intervention for lack of sufficient "interest" strikes at the heart of the *Sierra Club* decision which specifically broadened the categories of interest entitled to seek judicial review of executive action affecting the protection of natural resources having national importance. 405 U.S. at 738.

These concerns were explicitly raised by Judge Cudahy below in his dissent from the denial of intervention:

> The environmental interest is never a trivial one, and the interest by Congress in the acquisition by the public of the unique Crescent Dune is, as a practical matter, supported here only by the Council. The Secretary of Interior, after interminable delay, was content to abandon efforts at acquisition in September, 1983. Congress's interest in the acquisition of Crescent Dune, as expressed in the 1976 Amendments to the Indiana Dunes National Lakeshore Act, 16 U.S.C. §460u-12, must be taken seriously; the only entity prepared to represent this point of view is the Council. Certainly the Department of the Interior does not represent it.

754 F.2d at 861.

Not only is the federal proceeding exclusive in protection of the environmental interest at issue but the denial of intervention will also foreclose judicial review of the government action alleged to be clearly contrary to Congressional will. The denial of intervention to the Council may result in dismissal of the condemnation suit without any judicial consideration of the merits of the acquisition ordered by Congress. In addition, dismissal will prevent effective collateral challenges to the action due to the running of the applicable two-year statute of limitations. Barring intervention which will preclude judicial review even though the intervenor's standing is undisputed is flatly contrary to *Bryant* v. *Yellen*,

447 U.S. 352, 366-68 (1980), where the petitioners were entitled to intervene for purposes of appeal based on their standing. The unnecessary and premature foreclosure from judicial review of the Secretary of the Interior's action to forego preservation of a unique and valuable natural resource was strongly disapproved by Judge Cudahy:

> With all respect, this case may involve, though we cannot really know, a flouting of the public interest in conservation and or preservation of unique natural resources. Only by allowing participation in this proceeding by an organization of proven commitment not only to conservational values in general but to the Indiana Dunes in particular can the public interest in these national treasures be protected.

754 F.2d at 862. Because of the importance of judicial review to protect matters of significant public interest designated by Congress, the denial of intervention to the Council by the court below due to its lack of interest in the property must be reversed.

CONCLUSION

The Seventh Circuit's decision in this case is contrary to the express Congressional mandate of 16 U.S.C. §460u-12 as well as contrary to this Court's decisions and all relevant courts of appeals' decisions.

Petitioner requests this Court to issue a writ of certiorari to the U.S. Court of Appeals for the Seventh Circuit, and to summarily reverse the Seventh Circuit's decision or set this case for plenary review: June 24, 1985.

Respectfully submitted,

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[Cited as 754 F.2d 855 (1985)]

In the

United States Court of Appeals

For the Seventh Circuit

No. 84-1018
UNITED STATES OF AMERICA,

Plaintiff,

and

SAVE THE DUNES COUNCIL, INC.,

Proposed Intervening Plaintiff-Appellant,

v.

36.96 ACRES OF LAND, MORE OR LESS SITUATED IN THE COUNTY OF LAPORTE, STATE OF INDIANA & NORTHERN INDIANA PUBLIC SERVICE COMPANY, & UNKNOWN OWNERS,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Indiana—Hammond.
No. 78 C 317—Allen Sharp, *Judge.*

ARGUED SEPTEMBER 24, 1984—DECIDED
FEBRUARY 22, 1985

Before BAUER, WOOD, and CUDAHY, *Circuit Judges.*

BAUER, *Circuit Judge.* The district court denied the Save The Dunes Council's motion to intervene in the United States' condemnation action against the Northern Indiana Public Service Company. We affirm the denial of intervention.

I

The land involved in this case is a 36.96 acre tract bordering the southern edge of Lake Michigan. This area, commonly known as Crescent Dune, is situated between the Indiana Dunes National Lakeshore on the west, and one of Northern Indiana Public Service Company's (NIPSCO) generating stations on the east. The condemnation action underlying this case was instituted by the United States under the authority of the Indiana Dunes National Lakeshore Act, 16 U.S.C § 460u-12, which authorized the Secretary of the Interior to acquire Crescent Dune. Section 460u-12 placed strict time and monetary limitations on the Secretary's condmenation action. Among the limitations was the requirement that the property, excluding a sea wall, could not be purchased at a cost greater than $800,000, adjusted by the Consumer Price Index and excluding administrative costs. 16 U.S.C.§ 460u-12. NIPSCO has owned the land since 1932, which presently is subject to a mortgage to secure various bond instruments sold by NIPSCO. In 1976, the value of the land, including the sea wall, was approximately $1,762,000.

The Save The Dunes Council is an Indiana not-for-profit corporation. The Council, a public interest group incorporated in 1952, seeks legal protection for public use of the Indiana Dunes. Since its incorporation the Council has lobbied extensively for national legislation protecting the dunes and expanding the protected areas. The Council lobbied hard for the passage of the 1976 amendments to the Indiana Dunes Act, which authorized acquisition of Crescent Dune, and prepared the base map used to determine the official boundary information for the 1976 amendments.

Although the United States' condemnation action was filed in August 1978, the Council did not move to intervene until April 1982.[1] The Council also filed a complaint for

[1] The district court found that the Council's filing did not violate the timeliness requirement of Rule 24. The parties do not contest this ruling.

mandamus in the United States District Court for the District of Columbia and in the Northern District of Indiana against the Secretary of the Interior on October 19, 1983. These mandamus actions are still pending. On September 7, 1983, the government and NIPSCO submitted to the trial court a stipulation and joint motion to dismiss. Following briefing and a hearing on the Council's motion to intervene, the district court denied the motion.

II

Four requirements must be met before intervention will be granted as of right. The application must be timely. The intervenor must show an interest relating to the property or transaction which is the subject of the action. The intervenor must show that the disposition may as a practical matter impair or impede the intervenor's ability to protect that interest. And, the intervenor must show that that interest is not adequately represented by existing parties. *Gautreaux v. Pierce*, 690 F.2d 616, 635 (7th Cir. 1982). The proposed intervenors must satisfy each requirement before a court will grant the motion to intervene. *CFTC v. Heritage Capital Advisory Services, Ltd.*, 736 F.2d 384, 386 (7th Cir. 1984).

The district court found that the Council met only the first requirement of timeliness of the motion but failed to meet the other three requirements. The Council bases its challenge to the court's denial of intervention on the ground that its interest in Crescent Dune is legitimate, tangible and demonstrable, is unprotected by the parties to this action, and will be substantially impaired if the Council is denied intervention.

The district court examined the Council's alleged interest in the Crescent Dune and determined that "[w]hile the Council has played a laudatory role in the development of the Indiana Dunes National Lake Shore [sic], with respect to this tract of land, [the Council] is essentially a private citizen with no interest in the property sought to be condemned." Order at 5.

Moreover, the district court determined that NIPSCO had the "paramount . . . [and] only legal interest" in Crescent Dune. *Id.*

To obtain intervention as of right under Rule 24(a) (2), a proposed intervenor must show "a direct, significant legally protectable interest in the property or transaction subject to the action" in which intervention is sought. *Wade v. Goldschmidt*, 673 F.2d 182, 185 (7th Cir. 1982) (per curiam) (citing *Donaldson v. United States*, 400 U.S. 517, 531 (1971)). As the *Wade* court characterized the issue, the critical concern is not the "theoretical interests of proposed intervenors, . . . 'but whether already initiated litigation should be extended to include additional parties.' " 673 F.2d at 184.

An eminent domain proceeding such as this action considers only two legal interests. The first interest is that of the sovereign to exercise the power of eminent domain, which is essential to a sovereign government, *United States v. Carmack*, 329 U.S. 230, 236 (1946), and exercisable only by the legislature or as conferred by congressional enactment. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585-86 (1952). The second interest in an eminent domain proceeding is one of private ownership—essentially the ownership of the condemned property.

The interest of the sovereign in this case is that expressed in the Indiana Dunes National Lakeshore Act, Pub. L. 89-761, 80 Stat. 1309 (1966) (codified as amended at 16 U.S.C.§ § 460u to 460u-23), to acquire and preserve for public use certain portions of the Indiana Dunes. This interest can be effectuated by the Secretary of the Interior only as authorized by Congress and only to the extent of appropriations from Congress. The Council cannot claim that its right to intervene derives from this sovereign authority to condemn property for public use. No entity, public or private, other than the legislature, can claim the sovereign authority to condemn property—a "direct, significant legally protectable interest"—unless Congress has delegated that authority to the party.

Youngstown Sheet & Tube, 343 U.S. at 585. Congress has not delegated such authority to the Council; the Secretary of the Interior is the only person to whom Congress has delegated the authority to condemn Crescent Dune. 16 U.S.C.§§ 460u & 460u-12. The Council cannot, therefore, claim that its Rule 24(a) interest in the Crescent Dune is the same as that of the Secretary. Nor can the Council claim an ownership interest in the Crescent Dune. NIPSCO has the only claim to ownership of the Crescent Dune. The dune was acquired in fee by NIPSCO, together with other portions of its Michigan City, Indiana, generating station site in 1932.[2]

The Council argues, however, that on the basis of *Sierra Club v. Morton*, 405 U.S. 727 (1972), the Council's "intense concern for the National Lakeshore," Appellant's br. at 7, and "its members' personal aesthetic, conservational and recreational interest in the property," *id.* at 8, is a sufficient interest to allow intervention under Rule 24(a). *Sierra Club* is distinguishable, however, from the present case. *Sierra Club* arose under Section 10 of the Administrative Procedure Act (APA), 5 U.S.C.§ 702, and not under Rule 24(a). There is a qualitative difference between the "interest" which is sufficient for standing to bring an action under the APA and the "direct, significant legally protectable interest" required to intervene in a condemnation action. The "interest" which will satisfy *Sierra Club* is simple one "arguably within the zone of interest to be protected" by the statute. 405 U.S. at 733. The interest of a proposed intervenor, however, must be greater than the interest sufficient to satisfy the standing requirement. As the Supreme Court in *Donaldson* stated, the interest must be a "significantly protectable interest." 400 U.S. at 531. This

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[2] The real estate is subject to a mortgage administered by The Harris Trust and Savings Bank, Chicago, Illinois, but that mortgage is irrelevant to any interest with the Council seeks to assert.

circuit has also defined the necessary interest as one that is direct, substantial, and legally protectable. *Heyman v. Exchange National Bank of Chicago*, 615 F.2d 1190, 1193 (7th Cir. 1980).

While the Council's aesthetic and environmental interest in Crescent Dune may indeed be legitimate and demonstrable, we cannot say that it is direct, substantial, or legally protectable. Therefore, the Council's interest in "guaranteeing the preservation of [Crescent Dune's] natural beauty," Appellant's br. at 8, for public use is not the type of interest which justifies intervention under Rule 24(a). *Wade v. Goldschmidt*, 673 F.2d 182 (7th Cir. 1982), is particularly appropriate in the present context. In *Wade*, several property owners brought an action against the United States Department of Transportation and the State of Illinois challenging the proposed construction of an expressway and bridge across their property. Several groups sought and were denied the right to intervene in the action. One of the groups denied intervention was an Illinois non-profit corporation formed specifically to support construction of the proposed bridge and expressway. Although *Wade* involved an action under the APA in which the government was a defendant, and not a condemnation action in which the government is a plaintiff, the proposed intervenors in this case nonetheless have sought, as in *Wade*, to assert the position of the government. In *Wade*, a panel of this court denied intervention because "the governmental bodies charged with compliance [with federal statutes] can be the only defendants." 673 F.2d at 185. Similarly, where a proposed intervenor in a federal condemnation suit seeks to assert a position on behalf of the government, intervention must also be denied; only the Congress or its delegate can assert the rights of the sovereign.

Similarly, *Meridian Homes Corp. v. Nicholas W. Prassas & Co.*, 683 F.2D 201 (7th Cir. 1982), suggests that the Council's interest is not "direct" in the sense contemplated by Rule 24(a). In *Meridan* a panel of this court upheld the denial of

intervention by individuals who had an interest in one joint venturer's share of a real estate development. The court stressed that Rule 24(a) demanded "rigor in the requirement that the interest be direct and substantial." 683 F.2d at 204. The court thus held that a party with a legal right, and therefore an "interest," "only in the profits of the joint venture" is not entitled to intervene in an action where the resolution of the cause of action involved "[h]ow the profits are generated, how the joint venture is managed, or whether the joint venture continues." *Id.*

We therefore determine that just as the interest in *Meridian Homes* was not "direct and substantial," so the Council's "aesthetic and environmental interest" in NIPSCO's property is not "direct and substantial."

Accordingly, the district court's denial of the Council's motion to intervene as of right in the condemnation action below is affirmed.

III

The Council also appeals the district court's denial of permissive intervention under Rule 24(b). Permissive intervention is wholly discretionary with the district court and will be reversed on appeal only for an abuse of discretion. *EEOC v. United Air Lines, Inc.*, 515 F.2d 946, 949 (7th Cir. 1975). The district court denied permissive intervention "in order to avoid the likelihood of undue delay and prejudice to the rights of the original parties" and to avoid prolonging "an already lengthy and tired lawsuit." Order at 6. We find no abuse of discretion in this determination.

IV

The Council argues that our failure to allow its intervention in this condemnation action "would be to propose that no environmental group may step in to support a mandate of Con-

gress for protection of land under the National Park System should the Department of the Interior choose not to carry out that mandate." Appellant's br. at 7. We disagree that that assertion. An action for a writ of mandamus is always available to the Council or any other citizen seeking "to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C.§ 361. The Council obviously recognizes the possible availability of mandamus since it has filed a complaint for mandamus in both the United States District Court for the District of Columbia, Cause No. 83-3091, and in the Northern District of Indiana, Cause No. H84-0214, both filed on October 19, 1983. Although the remedy of mandamus is a drastic one to be invoked only in extraordinary situations, *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35 (1980), the Council's allegations against the Secretary of the Interior are the type for which mandamus would provide a remedy, if appropriate. *See United States v. Walker*, 409 F.2d 477, 481 (9th Cir. 1969). We do not intend to suggest by this that the Council will be successful in its mandamus action. That success, of course, will turn on whether the condemnation action was a ministerial duty, plainly defined and peremptory, or a discretionary duty, *McClendon v. Blount*, 452 F.2d 381, 383 (7th Cir. 1971), an issue not presently before us. Our only holding in this decision is that the Council has no right to intervene in the condemnation proceeding and that permissive intervention was properly denied.

For the above stated reasons, the district court is affirmed.

AFFIRMED.

CUDAHY, *Circuit Judge*, dissenting:

The position of the majority seems to be that because the Council does not have the power to commence eminent domain proceedings, and does not claim a proprietary interest in the land proposed to be condemned, it cannot have any right to

intervene. This is a myopic position unsupported by any authority. Indeed, the authority goes the other way. *See Trbovich v. United Mine Workers*, 404 U.S. 528 (1972) (employees may intervene pursuant to Rule 24(a) (2) in suit brought by Secretary of Labor challenging union election results, even though 29 U.S.C.§ 483 makes Secretary's suit the exclusive remedy and prohibits the union members from initiating such a private suit); *United States v. Board of School Commissioners*, 446 F.2d 573 (7th Cir. 1972) (requirements for intervention should be more liberal than those for standing to bring suit), *cert. denied sub nom. Citizens of Indianapolis for Quality Schools v. United States*, 410 U.S. 909 (1973); *Avery v. Heckler*, 584 F. Supp. 312 (D. Mass. 1984) (intervenor need not have standing necessary to initiate lawsuit).

The environmental interest is never a trival one, and the interest by Congress in acquisition by the public of the unique Crescent Dune is, as a practical matter, supported here only by the Council. The Secretary of the Interior, after interminable delay, was content to abandon efforts at acquisition in September 1983. Congress's interest in the acquisition of Crescent Dune, as expressed in the 1976 Amendments to the *Indiana Dunes National Lakeshore Act*, 16 U.S.C.§ 460u-12, must be taken seriously; the only entity prepared to represent this point of view is the Council. Certainly the Department of the Interior does not represent it.

In *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972), the Supreme Court recognized an actionable interest in "those who use [the land in question]," and further recognized, as actionable allegations, injury to "'aesthetic, conservational, and recreational' as well as economic values." *Sierra Club*, 405 U.S. at 738 (quoting *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 154 (1970)). The Council here supported its motion to intervene with an affidavit and supporting documents establishing the use by its members of the Indiana Dunes as well as its own 30-year commitment to the

establishment and preservation of the Indiana Dunes National Lakeshore. Council App. 42-71; Council Br. 8.

The majority apparently concedes that the Council would have *standing* to maintain suit with respect to the preservation of the Dunes, but attempts to distinguish the interest required for that purpose from the interest of an intervenor in an action to condemn land for this national project. Not only is this distinction offered without any basis in authority, but it is highly formalistic. An interest in a national park surely involves an interest in acquisition of land for it and acquisition of that land may very well require condemnation. And traditional standing is sufficient interest [illegible] of intervention will prevent ap[illegible] RES FEDERAL PRACT[illegible] ed. 1984); *United States* [illegible] 26 509 (9th Cir. 1977), *rev'd* [illegible] *sub nom. Bryant v. Yellen*, 447 U.S. [illegible] (stating court of appeals correct in deciding respondents had standing to intervene). Similarly, standing should be sufficient interest to intervene where the government has [illegible] a stipulation that would frustrate the will of Congr[illegible] clude judicial consideration of the merits. *Accord* [illegible] *ural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. [illegible] intervention of right allowed where government s[illegible] anti-trust suit would frustrate mandate of Court).

The sterility of the majori[illegible]h is illustrated by its statement that "the Council's aesthetic and environmental interest in the Crescent Dune may indeed be legitimate and demonstrable, [but] we cannot say that it is direct, substantial, or legally protectable." To say that the interest is "not legally protectable" is to beg the question, for it is only through inter-

vention that this interest can be protected.[1] On the basis of the majority's holding, whatever the Council's interest, it cannot be protected. It therefore goes without saying that the Council meets the second requirement for intervention of right since the proposed dispostion will not only impair but destroy the Council's ability to protect its interest.

On the third criterion — the adequacy of the representation of the Council's interest by the Department of the Interior — the record is appallingly clear. The government has been profoundly dilatory in pursuing acquisition of the land for the public benefit and has reached an agreement with NIPSCO to desist from representing the Council's interests. Further, the Council argues rather persuasively that NIPSCO and the government have been collaborating to frustrate the will of Congress and thereby to prejudice the interests of the Council. For example, the government in the district court made no response to the Council's Motion to Intervene but allowed NIPSCO to represent its interests in the intervention proceedings. A representative party who is collaborating with an opposing party is unlikely to be adequately representing a proposed intervenor's interest. *See Cuthill v. Ortman-Miller Machine Co.*, 216 F.2d 336 (7th Cir. 1954).

With all respect, this case may involve, though we cannot really know, a flouting of the public interest in conservation and in preservation of unique natural resources. Only by allowing participation in this proceeding by an organization of proven commitment not only to conservational values in general but to the Indiana Dunes in particular can the public interest in these national treasurers be protected. As Justice Douglas said in *Sierra Club:*

---

[1] A claim that mandamus proceedings give the Council a method to protect its interest is a concession that the interest is legally protectable. And an interest sufficient to support mandamus proceedings would certainly be "direct and substantial."

> With all respect, the problem is to make certain that the inanimate objects, which are the very core of America's beauty, have spokesmen before they are destroyed. It is, of course, true that most of them are under the control of a federal or state agency. The standards given those agencies are usually expressed in terms of the "public interest." Yet "public interest" has so many differing shades of meaning as to be quite meaningless on the environmental front.. .
>
> . . . [T]he pressures on agencies one way or the other are enormous. The suggestion that Congress can stop action which is undesirable is true in theory; yet even Congress is too remote to give meaningful direction and its machinery is too ponderous to use very often. The federal agencies of which I speak are not venal or corrupt. But they are notoriously under the control of powerful interests who manipulate them through advisory committees, or friendly working relations, or who have that natural affinity with the agency which in time develops between the regulator and the regulated.

405 U.S. at 745-46 (Douglas, J. dissenting) (footnote omitted).

In the instant case we do not have the regulator and the regulated, but instead the condemnor and the condemnee, But the threat to the national treasure is the same. Here the interest of the Council in preserving the Dunes has been clear and ongoing since 1952. That interest has been a major force in saving the Dunes so far. It deserves to be a force in this case.

For these reasons, I respectfully dissent.

A true Copy:
Teste:

. . . . . .
Clerk of the United States Court of Appeals for the Seventh Circuit

USCA 50234 Pandick Midwest Inc., Chicago—2-22-85—450

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604
CORRECTED APRIL 4, 1985
March 26, 1985

Before
Hon. WILLIAM J. BAUER, Circuit Judge
Hon. HARLINGTON WOOD, Jr., Circuit Judge
Hon. RICHARD D. CUDAHY, Circuit Judge

UNITED STATES OF AMERICA, Plaintiff, and SAVE THE DUNES COUNCIL, INC. Proposed Intervening Plaintiff-Appellant,	)	Appeal from the United States District Court for the Northern District of Indiana Hammond Division.
No. 84—1018 vs.	)	
36.96 ACRES OF LAND, MORE OR LESS, SITUATED IN THE COUNTY OF LAPORTE, STATE OF INDIANA & NORTHERN INDIANA PUBLIC SERVICE COMPANY, & UNKNOWN OWNERS, Defendants—Appellees.	)	No. 78 C 317 Allen Sharp, Judge

ORDER

On consideration of the petition for rehearing filed in the above-entitled cause by Proposed Intervening Plaintiff-Appellant Save the Dunes Council, Inc., a majority of the judges on the original panel having voted to deny the same,

It is ordered that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v. No. H 78-317

36.96 ACRES OF LAND, MORE OR LESS, SITUATE IN THE COUNTY OF LaPORTE, STATE OF INDIANA, and NORTHERN INDIANA PUBLIC SERVICE COMPANY, et al, and UNKNOWN OWNERS,

Defendants.

MEMORANDUM AND ORDER

I.

This case is presently before the court on the motion to intervene of the petitioner, Save the Dunes Council (Council) under Rule 24 Fed. R. Civ. P. The following facts are not disputed. On August 7, 1978, plaintiff, United States of America (United States) filed its "Notice of Condemnation" affecting 36.95 acres of land owned by Northern Indiana Public Service Company (NIPSCO) adjacent to its Michigan City Generating Station. NIPSCO filed its answer, objections to condemnation and motion to sustain objections on September 25, 1978. Subsequently, a request for a hearing on NIPSCO's legal objections was filed on October 26, 1981. A trial date of February 8, 1982 was set by order of the court October 9, 1981. That trial setting was vacated by order of January 22, 1982. On April 4, 1982, the Council filed a motion to intervene as a plaintiff under Rule 24. NIPSCO's response to the motion to intervene and a motion to strike were dock-

eted April 8, 1982. Council then filed a memorandum in support of its motion to intervene and an answer to NIPSCO's motion to strike on April 20, 1982.

On September 7, 1983, the United States and NIPSCO entered into a stipulation and joint motion to dismiss. A pretrial conference was held in Lafayette, Indiana on October 20, 1983 where oral argument was heard on the intervention issue and the parties were instructed to file supplementary briefs by October 31, 1983. In addition, the Council filed, in open court, a copy of a pleading related to the subject matter of this case, a complaint for mandamus under 28 U.S.C.§ 1361, which had been filed on October 19, 1983 in the United States District Court for the District of Columbia. In compliance with this court's directive, supplemental briefs were filed by the Council on October 31, 1983 and by NIPSCO on November 1, 1983. To date, the United States had made no independent response to the Council's motion to intervene.

II.

To intervene as of right under Rule 24(a)(2) Fed. R. Civ. P.[1], a proposed intervenor must show: (1) timely application; (2) an interest relating to the property or transaction which is the subject of the action; (3) that the disposition of the action may as a practical matter impair or impede his ability to protect that interest; and (4) that the interest is not adequately represented by existing parties. *Gautreaux v. Pierce*, 690 F. 2d 616 (7th Cir. 1982).

---

[1] Rule 24(a)(2) of the Federal Rules of Civil Procedure provides in pertinent part:

> Upon timely application anyone shall be permitted to intervene in an action . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Timeliness is a threshold question in a Rule 24(a) application and is determined by the court from all the circumstances in the exercise of its sound discretion. *Federal Deposit Insurance Corporation v. Hanrahan*, 612 F. 2d 1051, 1053 (7th Cir. 1980). As soon as a prospective intervenor knows or has reason to know his interest may be adversely affected by the outcome of the litigation, he must move promptly to intervene. *United States of American v. South Bend Community School Corp.*, 710 F. 2d 394 (7th Cir. 1983). NIPSCO contends that the Council should not be allowed to intervene at this time because the Council had ample opportunity to petition the court prior to the time of the original parties' settlement. A careful review of the court record in this action indicates that the first reference to a possible settlement was alluded to in the joint motion for extension of time filed by the United States and NIPSCO on January 12, 1982. The Council filed its motion to intervene on April 2, 1982 while the parties' joint motion for dismissal was not filed until more than a year later on September 7, 1983. From the commencement of this action to the early months of 1982, the Council had no reason to believe that intervention would be required to protect its alleged interest in the tract of land since condemnation of the NIPSCO property would seem to effectuate the intent of Congress as manifested in a series of National Lakeshore expansion bills, all of which included the area at issue in this case. Moreover, there has been neither a trial nor an extensive exchange of pleadings. Thus, the first requirement — timeliness — has been met by the Council.

The second test the Council must meet concerns a determination as to whether or not it has an interest relating to the property or transactions which is the subject of the action. Council alleges that it has an environmental interest in that for the past 30 years it has been actively engaged in, and, has been at the forefront of, the campaign to preserve and protect the Indiana Dunes for public use and enjoyment.

There is as yet no consensus of what constitutes a litigable interest for purposes of standing and intervention under Rule

24(a). C. A. Wright, Law of Federal Courts, at 503 (4th ed. 1983) The more liberal view is set forth in *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967). That case expanded the application of "interest" by holding that a state, a customer, and a competitor all have a sufficient interest to intervene in a government antitrust divestiture proceeding. *Cascade* gives a decidedly broad interpretation to Rule 24 while noting that intervention of right is:

> . . . a kind of counterpart to rule 19(a)(2)(i) on joinder of persons needed for just adjudication: where, upon motion of a party in an action, an absentee should be joined so that he may protect his interest which as a practical matter may be substantially impaired by the disposition of the action, he ought to have a right to intervene in the action on his own motion. *Id.* at 134n.3

However, the most recent interpretation of Rule 24(a)(2) by the Supreme Court has added a gloss that the rule is referring to a direct, "significantly protectable" interest in the property or transaction subject to the action. *Donaldson v. United States*, 400 U.S. 517, 531 (1971). Cases in this circuit construing a Rule 24(a) interest also emphasize an interest which is legally protectable. In *Wade v. Goodschmidt (sic)*, 673 F. 2d 182 (7th Cir. 1982), the court relied on this definition of "interest":

> [A]n interest, to satisfy the requirements of Rule 24(a)(2) must be significant, must be direct rather than contingent, and must be based on a right which belongs to the proposed intervenor rather than to an existing party to the suit. *Id.* at 185-86 n. 5. See also *Heyman v. Exchange National Bank of Chicago*, 615 F. 2d 1190 (7th Cir. 1980).

Clearly, the party with the paramount interest, indeed, the only legal interest, in the land at issue is NIPSCO. While the Council has played a laudatory role in the development of the Indiana Dunes National Lake Shore, with respect to this tract of land, it is essentially a private citizen with no interest in the property sought to be condemned to warrant intervention as a right.

Because the Council does not assert an interest in the property subject to this action, it has no protectable interest that can be impaired or impeded. Nor does it have the right to assert that its interest is being inadequately represented by the existing parties.

Moreover, the Council cannot avail itself of the permissive intervention allowed by Federal Rule of Civil Procedure 24(b). Rule 24(b) provides in pertinent part:

> Upon timely application anyone may be permitted to intervene in an action . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

While the Council's claim and this action center on the same factual basis, i.e. the condemnation of the same tract of land, this court concludes that permissive intervention should be denied in order to avoid the likelihood of undue delay and prejudice to the rights of the original parties.

Four years have elapsed since the institution of this suit and the original parties have submitted a stipulated judgment for the court's approval. To allow intervention at this point in time to a party with no legal interest in the private property which is the subject of the proceeding and whose position is contrary to that of both the original parties, would serve no viable purpose except to prolong an already lengthy and tired lawsuit. Accordingly, it is ordered that the Council's motion for intervention under Rule 24 be and hereby is DENIED.

Enter December 8, 1983

CHIEF JUDGE UNITED STATES DISTRICT COURT

cc USA Hmd.
G. Jones
F. Nymeyer
D. Haverstock
F Link
D Evans
E Osann

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	CIVIL NO. H 78-317 Tract No. 96-101
36.95 ACRES OF LAND, MORE OR LESS, SITUATE IN THE COUNTY OF LAPORTE, STATE OF INDIANA, AND NORTHERN INDIANA PUBLIC SERVICE COMPANY, AN INDIANA CORPORATION, ET. AL, AND UNKNOWN OWNERS, Defendants.	)	

COMPLAINT IN CONDEMNATION

1. This is an action of a civil nature brought by the United States of America at the request of the Solicitor of the Department of The Interior for the taking of the property under power of eminent domain and for the ascertainment and award of just compensation to the owners and parties in interest.

2. The uses for which the property is to be taken and the authority for the taking are set forth in Schedule "A" attached hereto and made a part hereof.

3. The estate to be taken is described in Schedule "B" attached hereto.

4. The property so to be taken is described in Schedule "B" and delineated in Schedule "C", attached hereto and made a part hereof.

5. The persons having or claiming an interest in the property whose names and addresses are ascertainable by a reasonably diligent search of the records and those whose names have otherwise been learned are described in Schedule "B" attached hereto and made a part hereof.

6. The Treasurer of LaPorte County, Indiana, may have or claim an interest in the property by reason of taxes and assessments due and exigible.

7. In addition to the persons named, there are or may be others who have or may claim some interest in the property to be taken, whose names are unknown to the plaintiff and such owners are made parties to the action under the designation of "Unknown Owners".

WHEREFORE, the plaintiff demands judgment that the property be condemned and that just compensation for the taking be ascertained and awarded and for such other relief as may be lawful and proper.

David T. Ready
United States Attorney

By: _____

Richard L Kieser
Assistant United States Attorney
322 Federal Building
South Bend, Indiana 46601

Trial by jury of the issue of just compensation is demanded by plaintiff.

SCHEDULE "A"

INDIANA DUNES NATIONAL LAKESHORE

AUTHORITY FOR THE TAKING

The authority for the taking of the land is under and in accordance with the Act of Congress approved August 1, 1888, 25 Stat. 357, as amended (40 U.S.C., sec. 257); the Land and Water Conservation Fund Act of 1965, 78 Stat. 897, as amended (16 U.S.C., sec. 4601-4, et seq.); and under the further authority of the Act of Congress approved November 5, 1966, 80 Stat. 1309, which Act authorized the Indiana Dunes National Lakeshore, as amended; and under the authority of the Department of the Interior and Related Agencies Appropriation Act, 1978, 91 Stat. 287, which Act appropriated funds for such purposes.

PUBLIC USES

The public uses for which said land is taken are as follows: The land is required for the proper administration, preservation and development of Indiana Dunes National Lakeshore for the use, benefit and enjoyment of the public. The said land has been selected for acquisition by the United States of America for said purposes, and for such other uses as may be authorized by Congress or by Executive Order.

SCHEDULE "B"

INDIANA DUNES NATIONAL LAKESHORE
LA PORTE COUNTY, INDIANA

TRACT 96-101

DESCRIPTION

A tract of land situtate in the Southeast Quarter, Section 30 and the Northeast quarter, Section 31, Township 38 North, Range 4 West, 2nd Principal Meridian, being more particularly described as follows:

All that part of the Southeast Quarter of said Section 30, and that part of the Northeast Quarter of said Section 31, lying Northwesterly of a line described as follows: Commencing at the northwest corner of the Northeast Quarter of said Section 31; thence South, along the North-South centerline of said Sections 30 and 31, 263.14 feet, more or less, to the Northern right of way line of an existing 132 KV tower line right of way; thence North 36° 16′ East, to the south line of said Section 30; thence continuing North 36° 16′ East, 2,750.00 feet; thence at right angles to the last described line, Northwesterly to the Water's edge of Lake Michigan. Excepting from the above described tract, the existing seawall and land lying thereunder.

Said Tract contains 36.95 acres, more or less.

The above described Tract 96-101 is part of that land acquired by Northern Indiana Public Service Company from Indiana Industrial Land Company, Lake County, Indiana by deed dated June 3, 1932 and recorded June 21, 1932 in Deed Record 160 Pages 393-396/Document number 20876 of the LaPorte County, Indiana records.

ESTATE TO BE ACQUIRED: The fee simple title to the land, subject to existing easements for public roads, highways, rights or (sic) way for railroads, pipelines, utilities, flumes, canals, ditches, telephone, telegraph and power transmission lines, and subject further to the easement noted at Item 3, Schedule B of the Title Policy Number LO 202568-242. Also, subject to the rights of the public in any submerged portions of the subject premises lying below the ordinary high water mark of Lake Michigan. A location for reasonable right of ingress and egress for the purpose of providing maintenance on the seawall will be determined at a later date by the Secretary of the Department of the Interior.

NAMES AND ADDRESSES OF PURPORTED OWNERS:

Northern Indiana Public Service Company,
An Indiana Corporation
5265 Hohman Avenue
Hammond, Indiana 46325

NAMES AND ADDRSSES OF OTHER PARTIES WHO MAY HAVE OR CLAIM AN INTEREST IN THE LAND:

Harris Trust and Savings Bank
and R. G. Mason, Trustees
111 West Monroe Street
Chicago, Illinois 60603

Norman M. Wagner
7871 West County Road 400 North
LaPorte, Indiana 46350

Frederick Nymeyer
707 North Main Street
La Porte, Indiana 46350

Henry W. Deutscher, et al
6751 East 200 North
La Porte, Indiana 46350

Edna S. Haverstock
Route 1
Rolling Prairie, Indiana 46371

Ted Holom
2786 Knoll Road
Portland, Michigan 48875

La Porte County Treasurer
Courthouse
La Porte, Indiana 46350

SCHEDULE "C"

Map of INDIANA DUNES NATIONAL LAKESHORE, Segment 96, United States Department of the Interior, February 3, 1977, Rev. 2/1/78, submitted separately.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

UNITED STATES OF AMERICA, Plaintiff	)	
v.	)	CIVIL NO. H 78-317
36.95 ACRES OF LAND, MORE OR LESS, SITUATE IN THE COUNTY OF LAPORTE, STATE OF INDIANA AND NORTHERN INDIANA PUBLIC SERVICE COMPANY, AN INDIANA CORPORATION, ET. AL, AND UNKNOWN OWNERS, Defendants.	)	Tract No. 96-101

MEMORANDUM IN RESPONSE TO OBJECTIONS

Comes now the United States of America, by its attorney, R. Lawrence Steele, Jr., United States Attorney for the Northern District of Indiana, and submits its Memorandum in Response to Objections.

I. THE CONDEMNATION OF TRACT NO. 96-101 IS AUTHORIZED BY 16 U.S.C. 460u ET. SEQ.

The Government contends that the instant condemnation action is authorized by the Act to Provide for the Establishment of the Indiana Dunes National Lakeshore, Public Law 89-761, as amended, 16 U.S.C. 460u et. seq.

The land that is the subject of this action was not included in the original legislation, Public Law 89-761 passed in November, 1966. However, that statute was amended by Public Law

94-549 passed in October, 1976. Section 13 of that Act (16 U.S.C. 460u-12) provides:

> The Secretary shall acquire the area on the map referred to in section 460u of this title as area III-B within two years from the effective date of this section only if such area can be acquired for not more than $800,000, exclusive of administrative costs of acquisition, as adjusted by the Consumer Price Index: *Provided*, That the Secretary may not acquire such area by any means after two years from the effective date of this section.

The defendant Northern Indiana Public Service Company accurately describes the tract that is the subject of this case, 96-101 as less than the whole of area III-B. Tract 96-101 does not include the seawall in area III-B. As authorized in the legislative history of Public Law 94-549, this area is a natural extension of the existing park and very important to various features of the park:

> This parcel contains about 30 acres at an approximate cost of $1,762,000. At the eastern extremity of the Lakeshore boundaries, as presently drawn, is a small hazardly shaped tract between the shore and transmission lines from the Michigan City NIPSCO generating station. This was left out of the original park plan, although it would appear to be a natural extension of the beach. The land is the property of the power company.
>
> This is a highly scenic sample of dunes shoreline, with a crescent-like formation of the beach that makes a pleasant little bay frequently used for swimming. There are impressive saddle-shaped dunes, 80 feet high, behind the beach that serve as a buffer between the scenic Mount Baldy area to the west and the NIPSCO generating plant. Senate Report 94-1189, 1976 U.S. Code Cong. and Adm. News 5636-5637.

As shown by the legislative history above, Congress clearly knew that acquisition of the entire area of III-B was estimated

to be in excess of $1,700,000. However, the bill was amended to its present form with an $800,000 limit by an amendment proposed by Senators Percy and Stevenson of Illinois and Senators Bayh and Hartke of Indiana.

The Government contends that this legislation authorizes condemnation of less than the total area of area III-B. It is a well-settled principle of legislation construction that if the liberal construction of the words of a statute would lead to an absurd, unjust or useless result, the statute must be construed to avoid that result. Eg. *Rector of Holy Trinity Church v. United States*, 143 U.S. 457, 12 S. Ct. 511; *United States v. Mendoza*, 565 F. 2d 1285 (5th Cir., 1978). Given Congress' recognition of the value of the entire area III-B as being in excess of $1,700,000, the $800,000 limit means that the Government could only acquire this tract if NIPSCO made a gift of $900,000 to the Government, unless a partial acquisition was contemplated.

Moreover, the Secretary of the Interior has the discretion to make minor boundary changes in the Park. See, 16 U.S.C. 460u-2. The Secretary need not acquire all the land authorized. For example, in *United States v. 57.79 Acres of Land*, 70H 46(2), (N.D. Ind., 1973), the Government dismissed a condemnation suit in which the jury verdict of just compensation was regarded as excessive by the Secretary and the land, Tract No. 36-122, was excluded from the Park.

II. THE GOVERNMENT IS PROCEEDING IN THIS ACTION WITH A GOOD-FAITH APPRAISAL OF THE AREA SOUGHT TO BE ACQUIRED UNDER THE AUTHORIZATION LEVEL OF 16 U.S.C. 460u-12.

Section 460u-12 of Title 16, United States Code, provides that cost of the acquisition must not exceed $800,000 as adjusted by the Consumer Price Index. The Government's appraisal for Tract No. 96-101 (Area III-B less the seawall) was $184,750. The government's current appraisal is $277,000, well within the $800,000 limit.

III. THE SECRETARY OF THE INTERIOR HAS COMPILED WITH THE TIME LIMITS OF SECTION 460u-12 OF TITLE 16, UNITED STATES CODE.

Section 460u-12 provides that "the Secretary may not acquire such area (III-B) by any means after two years after the effective date of this section." For the purpose of this litigation, we would agree with defendant NIPSCO that the effective date of the section is October 18, 1976. This action was filed on August 4, 1978, within two years of that date. The Government contends that the filing of this action within that period is sufficient to meet the time limits of 16 U.S.C. 460u-12. As Senator Bayh stated in explaining the amendment:

> It is the intent of the Senators from Indiana that the Secretary place a high priority on acquisition of this valuable pristine area, and the proviso at the end of new section 13 is not intended to prohibit acquisition if the Secretary has commenced condemnation proceedings within the designated two years but the actual transfer of title has been delayed beyond the two years by opposition to federal acquisition from the present utility or then existing owners. Congressional Record, 94th Cong. 2d Sess., Volume 122, Part 25, page 32315.

WHEREFORE, it is respectfully submitted that the objection of defendant NIPSCO should be overruled.

Respectfully submitted,

R. Larence Steele, Jr.
United States Attorney

By: _____
Andrew B. Baker, Jr.
Assistant United States Attorney

CERTIFICATE OF SERVICE

This is to certify that on the 21st day of December, 1981, I deposited in the United States Mail at Hammond, Indiana, a copy of Memorandum in Response to Objections properly addressed to Mr. Frederick H. Link, Eichhorn, Eichhorn & Link, Attorneys at Law, 5243 Hohman Avenue, Hammond, Indiana 46320.

Susan Harrison, Legal Clerk

Office of the United States Attorney
Room 312, Federal Building
507 State Street
Hammond, Indiana 46320
(219) 932-5500 ext. 5215

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	CIVIL NO. H 78-317
36.95 ACRES OF LAND, MORE OR LESS, SITUATE IN THE COUNTY OF LAPORTE, STATE OF INDIANA, and NORTHERN INDIANA PUBLIC SERVICE COMPANY, an Indiana Corporation, et. al., and UNKNOWN OWNERS, Defendants.	)	Tract No. 96-101

MOTION TO INTERVENE AS A PLANTIFF
UNDER RULE 24

Comes now Saves the Dunes Council, Inc., by its counsel, pursuant to Rule 24, Fed. R. Civ. P., and moves for leave to intervene as a Plaintiff to assert its interest in the property which is the subject of this action. Petitioner requests a hearing on this motion in view of the importance of this case to the public interest.

In support of this motion, Petitioner submits the following facts and the attached Affidavit of Charlotte J. Read for the Court's consideration:

1. Save the Dunes Council, Inc. (hereinafter "the Council") is an Indiana Not-For-Profit corporation having approxi-

mately two thousand (2000) members, many of whom reside in Northern indiana. The Council has existed for thirty (30) years in order to preserve and protect the Indiana Dunes for public use and enjoyment.

2. The Council actively participated in development of the Congressional legislation which authorized the acquisition of this particuiar property and the subsequent appropriation of funds for its purchase. Moreover, the Council has actively participated in every hearing held to consider establishment and expansion of the Indiana Dunes National Lakeshore, and its members engaged in activities at this valuable natural resource on a regular basis. It is thus clear that the Council's interest in the subject property is legitimate, tangible and demonstrable. (See Affidavit of Charlotte J. Read).

3. This motion for intervention is timely since the Council had no prior indication that intervention was necessary to protect its interest, and neither of the existing parties will be prejudiced by intervention given the status of the pleadings and the absence of a trial date.

4. The Council has an obvious interest relating to the property which is the subject of this litigation, and this organization is so situated that disposition of this litigation without its intervention may as a practical matter impair or impede its ability to protect that interest.

5. Recent developments in the above captioned litigation, such as the absence of the requisite current and approved appraisal for this property, taken in light of the past dilatory performance of the Department of the Interior, show that the interest of the petitioner is not being adequately represented by the Plaintiff. (See Affidavit of Charlotte J. Read, par. 12-15; Exhibit J.).

WHEREFORE, Save the Dunes Council, Inc. requests that it be allowed to intervene as a plaintiff in order to protect its interest in the property which is the subject of this condemnational proceeding.

Respectfully submitted,

Donald J Evans
EVANS & EVANS
107 North Morgan Boulevard
Valparaiso, Indiana 46383
(219) 462-5128

Edward W. Osann, Jr.
One IBM Plaza, Suite 4600
Chicago, Illinois 60611
(312) 822-9666

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

UNITED STATES OF AMERICA, Plaintiff,	)	
	)	CIVIL NO. H 78-317
vs.	)	
36.95 ACRES OF LAND, MORE OR LESS, SITUATE IN THE COUNTY OF LAPORTE, STATE OF INDIANA, and NORTHERN INDIANA PUBLIC SERVICE COMPANY, an Indiana Corporation, et. al., and UNKNOWN OWNERS, Defendants.	)	Tract No. 96-101

AFFIDAVIT OF
CHARLOTTE J. READ

STATE OF INDIANA)
) SS:
COUNTY OF PORTER)

Charlotte J. Read, being duly sworn, deposes and states as follows.

1. Petitioner Save the Dunes Council, Inc. (hereinafter referred to as "the Council") is a not-for-profit corporation incorporated under the laws of the State of Indiana in 1952. The Council maintains an office at Dunes Highway, P.O. Box 114, Beverly Shores, Indiana 46301.

2. I am Executive Director of the Council, having served in that position ever since 1978. From 1975 through 1977, I held the position of Executive Secretary of the Council.

3. For the past 30 years, the main purpose of the Council has been and still is the preservation and protection of the Indiana Dunes for public use and enjoyment.

4. The efforts of the Council to secure national protection for the Indiana Dunes began in 1958 when a bill to preserve the area through the National Park System was introduced into the United States Senate. These efforts culminated in 1966 when the Congress authorized the Indiana Dunes National Lakeshore as a unit of the National Park System (Public Law 89-761, November 5, 1966). Congress appropriated the first funds for land acquisition in 1967.

5. Since many unspoiled natural areas had not been included in the National Lakeshore under Public Law 89-761 as finally passed, the Council initiated a proposal in 1971 to enlarge the boundaries of the National Lakeshore. At the Council's request, a committee of citizens and scientists inventoried high quality natural areas suitable for inclusion in a May, 1971 proposal to enlarge the boundaries of the National Lakeshore. This proposal, copy attached in pertinent part as *Exhibits A-A4*, covered several tracts of land, among them area III-B known as the "Crescent Dune" area including Tract No. 96-101 which is the subject of the above captioned condemnation suit.

6. The Council's May, 1971 proposal, representing the work product of the persons identified in *Exhibit B* attached hereto, formed the basis for a series of National Lakeshore expansion bills, all of which included area III-B, in the 92nd Congress (H.R. 10209, S. 2380), the 93rd Congress (H.R. 3571, 12970, 14151, S. 820); and the 94th Congress (H.R. 11455, S. 3329). In addition to the 1971 proposal, the Council prepared and distributed widely two informational brochures on the dunes expansion proposals: "Missing Pieces of the Indiana Dunes National Lakeshore", *Exhibit C*, and "Help Save the

Last of the Dunes, Now, before they're gone forever", *Exhibit D*, both attached. Exhibit D featured the Crescent Dune area, III B, on the cover.

7. The Council prepared and kept current the detailed maps which contained the boundary information for all dunes expansion proposals introduced in the Congress between 1971 and 1976. In addition, the Council prepared the base map used to determine the official boundary information for Public Law 94-549 which was signed into law on October 18, 1976 and served to expand the Indiana Dunes National Lakeshore.

8. The Council's representatives testified in support of inclusion of area III-B at every public hearing held to consider those park expansion bills identified in paragraph 6 above. The Council's testimony at the September 30, 1974 hearing on S. 820, held before the Senate Subcommittee on Parks and Recreation, included photographs of the III-B area, *Exhibits E-E2* attached.

9. The Department of Interior's National Park Service opposed acquisition of Area III-B, *Exhibits F-F3* attached. The acquisition cost estimate presented by the National Park Service at the June 17, 1974 hearing before the House Subcommittee on National Parks and Recreation included not only the seawall fronting the property but also the mineral value of the sand, a practice not followed in acquisition cost estimates for similar properties owned by others (Exhibit F3). Similar testimony opposing acquisition of area III-B was presented by the Department at the September 30, 1974 hearing before the Senate Subcommittee. Again, at the May 26, 1976 hearing before the Senate Subcommittee on S. 3329, the Department of the Interior opposed acquisition of area III-B, *Exhibit G-G2* attached.

10. During the 94th Congress, the House passed H.R. 11455 and the Senate passed S. 3329, both including area III-B over the objections of the Department of the Interior. The Senate version of the legislation was subsequently approved by the House and became Public Law 94-549 on October 18, 1976.

Section 13 of the Senate bill contains specific conditions for acquisition of area III-B, which was approved after the Senate rejected other proposals for acquisition of the property on a basis less than fee simple title.

11. Since passage of Public Law 94-549, the Dunes expansion bill, the Council has followed the progress of Interior's acquisition of the III-B area, including Tract No. 96-101. This has been done because of the high natural value of the property, the specific conditions for its acquisition, and the lack of support for its acquisition demonstrated by the Department of the Interior and the National Park Service.

12. On December 23, 1981, the Council filed a Freedom of Information Act request to determine the current status of the condemnation proceedings on the III-B property, *Exhibit H* attached. The National Park service response, *Exhibit I*, indicated that trial had been set for February 8, 1982. The Council later determined that the trial date had been postponed indefinitely and this was confirmed by a February 24, 1982 follow-up reply to our Freedom of Information Act Request, *Exhibit J*.

13. The U.S. Attorney's Memorandum in Response to Objections, filed December 21, 1981 in the above-captioned condemnation case, states that "The Government's current appraisal is $277,000 . . . . " The National Park Service Midwest Regional Director's letter of February 24, 1982, *Exhibit J*, furnished an obsolete appraisal report but admitted "there is an updated unapproved version of it, but it is still in draft and predecisional form." The letter went on to say that a request for the updated draft appraisal would be denied.

14. The reluctance of the Department of the Interior to proceed with condemnation of Northern Indiana Public Service Company property within the boundary of the National Lakeshore has already been demonstrated. For example, Tract 02-133 consisting of 9.11 acres in the area of the greenbelt adjacent the Bailly plant was included within the National

Lakeshore boundary under the 1966 Act. Despite the prompt availability of appropriations for land acquisition, and repeated urging by the Council, the Department of the Interior delayed for more than 12 years to acquire this property. Even then, it was only after the Council protested publicly on January 21, 1978 in recorded testimony before the Advisory Commission of the Indiana Dunes National Lakeshore.

15. Given the past dilatory performance of the Department of the Interior, the only way to assure acquisition of area III-B as a part of the Indiana Dune National Lakeshore, in accordance with the clear intent of Congress, is for the Council to be admitted as a party to the above captioned condemnation suit.

Further deponent sayeth not.

CHARLOTTE J. READ

Subscribed and sworn to me, a Notary Public, this 2nd day of April, 1982.

Patience A. Bennett, Notary Public

My Commission Expires:
October 31, 1984

PROPOSED ADDITIONS

TO THE

INDIANA DUNES NATIONAL LAKESHORE

MAY, 1971

***

SAVE THE DUNES COUNCIL, INC.

INTRODUCTION

The Indiana Dunes National Lakeshore is approaching its fifth anniversary, which occurs next October.

Acquisition of the park lands authorized under the Lakeshore Act of 1966 will by then be near completion. The first limited summer activities program will have been completed. Some of the abandoned and decaying structures cluttering certain park areas will have been removed.

On its fifth anniversary, however, much will remain to be done before the dream of an Indiana Dunes National Lakeshore becomes a reality. Additional funds are needed to complete authorized land acquisitions. No funds have yet been appropriated for park development. Funds available for bare maintainance (sic), protection and administration are minimal.

Save The Dunes Council is greatly concerned by these problems and delays. It is encouraged and heartened by the efforts underway now by friends of the Lakeshore in Congress to obtain the necessary appropriations, however, and is confident that these unfortunate circumstances are temporary.

The Council is perhaps even more concerned about present and future threats to the Lakeshore and to prime natural lands outside the park boundaries from the steady degradation of the surrounding region. We suggest that this interim period between park formation and full development is an appropriate time to consider the adequacy of the Lakeshore's present scope in the light of changing conditions and with an eye to the long-range future.

During the period of land acquisition the Council has been keeping park areas under close observation. We have studied the potential impact of industrial and commercial development on the present Lakeshore boundaries and have considered the effects of pollution, noise, traffic and adjacent construction on the park and its enjoyment by the public. We have been aided in these studies and observations by respected naturalists, geologists and authorities in other pertinent fields, along with concerned private citizens and allied conservation groups.

The unanimous conclusion that has emerged is that carefully selected additions must be made to the present Lakeshore area, and as quickly as possible. On these pages we present a series of proposals which it is hoped will form the basis for the legislation necessary to put them into effect. The areas recommended for inclusion are designed to make the park more unified, viable and safe from future encroachments. Most were part of original park proposals and early bills. We believe they make sense, are in accord with sound land-use policy, and are favorable to the healthy development of the entire region and the quality of life of its people.

This affords an opportunity to save additonal areas of unique conservation value and to assure full realization of the Lakeshore's purpose. It is an opportunity that exists now, but if lost will not come again.

THE RECOMMENDED AREAS

The areas proposed for addition generally fall into one or more of the following categories:

1. The unspoiled dune ridges and interdunal ponds, bogs and meadows which enhance the basic purposes of the National Lakeshore.

> "... to preserve for the educational, inspirational, and recreational use of the public certain portions of the dunes and other areas of scenic, scientific and historic interest and recreational value ..."

Most of the areas of this kind available were included in the original "1963 Compromise" bill. Such tracts usually are devoid of existing structures, are largely under "block" ownership and, thus, would be usable for park purposes immediately upon acquisition by the National Park Service.

2. Semi-developed lands, such as the remaining sections of the town of Beverly Shores still outside the park. While containing scattered residences or other structures, the dunes are still largely unspoiled. Their acquisition now will provide an opportunity perhaps never to come again for enhancing and unifying the core sections of the park.

3. Scenic river valleys and wetlands valued for both ecological and recreational uses, as hiking and canoing resources, bird-life preserves, and so on. They are largely devoid of structures or conflicting uses, and may be protected either by direct acquisition or through the establishment of conservation easements. They would add continuity to the Lakeshore plan.

4. Buffer zones and other areas which are shown by experience, circumstances or anticipated developments to be necessary to protection of the park's values and fulfillment of its long-term objectives.

The specific recommendations are listed in the following outline and described in the same order in the ensuing pages. A large scale map of the Lakeshore and surrounding region has been prepared to accompany these proposals. The recommended additions are outlined on the map and identified by numerical-alphabetical designations corresponding to those in the outline.

ORDER OF PROPOSALS

I. West Beach Area Expansion

- A. Buffer Zone Additions
- B. Old Glacier Lake Dune and Marsh Unit
- C. Eastern Beach and Dunes Extension Unit
- D. Long Lake Extension Unit
- E. Marquette Park and Lagoon

II. Dune Acres, Porter, Tremont Additions

- A. NIPSCO Greenbelt Section
- B. Waverly Road Section
- C. Tremont Road Section
- D. Veden Road Section

III. Beverly Shores Additions

- A. The "Island" Section
- B. Crescent Dune Section

IV. Little Calumet Wetlands Additions & Easement

- A. Blue Heron Unit
- B. Little Calumet River Unit
- C. Little Calumet—Salt Creek Conservation Easement

V. Pinhook Bog Enlargement

VI. Detached Additions

- A. West Gary Preserve
- B. The Hoosier Prairie
- C. Mud Lake

III. BEVERLY SHORES ADDITIONS — (continued)

B. CRESCENT DUNE SECTION

At the eastern extremity of the Lakeshore a small trainingularly shaped tract between the lake shore and transmission lines from the Michigan City NIPSCO generating station was left out of the original park plan, although it would appear to be a natural extension of the beach. The land is the property of the power company. It is not needed for the planned plant expansion there or for additional transmission lines or any other reason we can see that would make its incorporation by the park a hardship on the company. It is being threatened, however, by NIPSCO's apparent intention to use part of the area for dumping of solid wastes.

This is a highly scenic sample of dunes shoreline, with a crescent-like formation of the beach that makes a pleasant little bay frequently used for swimming. There are impressive saddle-shaped dunes, 80 feet high, behind the beach that serve as a buffer between the scenic Mt. Baldy area to the west and the NIPSCO facilities.

In view of the major concessions granted NIPSCO in the vicinity of its Bailly site, it should not object to having this small section taken.

Save the Dunes Council Report, August 1971, EXHIBIT B to the Affidavit of Charlotte J. Read, submitted separately.

Brochure, "Help Save the last of the Dunes . . . ", EXHIBIT D to Affidavit of Charlotte J. Read, submitted separately.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

UNITED STATES OF AMERICA, Plaintiff	)	
v.	)	CIVIL NO. H 78-317
36.95 ACRES OF LAND, MORE OR LESS, SITUATE IN THE COUNTY OF LAPORTE, STATE OF INDIANA, AND NORTHERN INDIANA PUBLIC SERVICE COMPANY, ET. AL, AND UNKNOWN OWNERS, Defendants	)	Tract No. 96-101

STIPULATION AND JOINT MOTION TO DISMISS

Whereas plaintiff, the United States of America, and defendant, Northern Indiana Public Service Company, stipulate and agree as follows:

1. That on August 14, 1978, the plaintiff filed a complaint in condemnation and requested that the fee simple title, subject to existing easements, etc., be acquired by the plaintiff with respect to Tract No. 96-101.

2. That the interests included in Tract No. 96-101 in the above-captioned proceedings are no longer required by the plaintiff.

3. That no declaration of taking has been filed in this proceeding. No order of possession has been obtained, and title to the real estate described in the complaint filed herein has not vested in the United States of America.

4. That there are no existing claims for compensation with respect to said tract of land.

NOW THEREFORE, the plaintiff and the defendant hereby agree that the proceeding be dismissed. The defendant hereby waives any claim that it may have against the plaintiff for any costs, disbursements, and expenses, including attorney, appraisal, and engineering fees, incurred in the proceeding, pursuant to the provisions of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Public Law 91-646, 42 U.S.C.A. Section 4654.

The parties hereto hereby consent to the entry by the Court of all orders, judgments, and decrees necessary and appropriate to effectuate this stipulation and agreement.

Dated this 7th day of September, 1983.

UNITED STATES OF AMERICA

R. Lawrence Steele, Jr.
United States Attorney

By: _____

Andrew B. Baker, Jr.
Assistant United States Attorney

NORTHERN INDIANA PUBLIC SERVICE COMPANY

By. _____

Paul A. Rake
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of July, 1985, nine (9) copies of the petition for a writ of certiorari to the U.S. Court of Appeals for the Seventh Circuit were served upon:

Paul A. Rake
Eichhorn, Eichhorn & Link
Attorneys At Law
5243 Hohman Avenue
Hammond, Indiana 46320

Andrew B. Baker, Jr.
Assistant United States Attorney
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507 State Street
Hammond, Indiana 46320

Solicitor General
Department of Justice
Washington, D.C. 20530

by depositing three (3) copies of the same in the United States mail in envelopes properly addressed to each of them with sufficient first class postage affixed.

By: _____
Donald J. Evans
Attorney for Petitioner

FILED
OCT 11 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-426 (2)

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

SAVE THE DUNES COUNCIL, INC.,

Petitioner

and

UNITED STATES OF AMERICA,

Respondent

v.

36.96 ACRES OF LAND, MORE OR LESS, SITUATED IN THE COUNTY OF LAPORTE, STATE OF INDIANA, AND NORTHERN INDIANA PUBLIC SERVICE COMPANY,

Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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October 11, 1985

BEST AVAILABLE COPY

30 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether Council has established a basis minimally sufficient for granting the petition.

2. Whether the Seventh Circuit properly denied a plaintiff-intervention as of right by Council in an eminent domain proceeding.

3. Whether the District Court abused its discretion in denying permissive intervention to Council.

In accordance with Sup. Ct. R. 28.1, we note the Respondent Northern Indiana Public Service Company does not have a parent company, and all its subsidiaries are wholly owned.

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STATEMENT OF THE CASE

A. Nature of the Case.

The petition for writ of certiorari is filed to review an order of the United States Court of Appeals for the Seventh Circuit, dated February 22, 1985 (Pet. for Cert. A-1). The Seventh Circuit denied a petition for rehearing on April 4, 1985 (Pet. for Cert. A-13).

Petitioner appealed to the Seventh Circuit from an order entered by the United States District Court for the Northern District of Indiana, Hammond Division on December 8, 1983. That order denied the petition of the Save the Dunes Council, Inc. (Council) to intervene under Fed. R. Civ. P. 24 in an eminent domain proceeding as a co-plaintiff with the government to condemn property owned by Northern Indiana Public Service Company (NIPSCO) (Pet. for Cert. A-14). The action arose out of NIPSCO's objections to the attempt of the United States of America (United States) to appropriate a portion of its Lake Michigan shoreline under the Indiana Dunes National Lakeshore Act, 16 U.S.C. §§ 460u-12.

B. Course of Proceedings.

On August 4, 1978, the United States filed its complaint in condemnation seeking the appropriation of a 36.96 acre parcel of land known as Crescent Dune adjacent to NIPSCO's Michigan City Generating Station for inclusion into the Indiana Dunes National Lakeshore. The complaint avers that authority for the appropriation arises from: Condemnation Act of 1888, 40 U.S.C. § 257 (1888); Land and Water Conservation Act, 16 U.S.C. § 4601–4, 1 *et seq.* (1965); Indiana Dunes National Lakeshore Act, 16 U.S.C. § 460u *et seq.* (1966); and Department of the Interior and Related Agencies Appropriation Act, 91 Stat. 287 (1978).[1] NIPSCO filed its Answer, Objections to Condemnation

[1]Complaint filed by the United States, Pet. for Cert., A-19.

and Motion to Sustain Objections on September 25, 1978.[2] The substance of the objections is that the United States had failed to comply with limitations prescribed in the Congressional grant of authority to condemn the specific land in question *viz* "[t]he Secretary shall acquire the area on the map referred to in Section 460u of this title as area III-B within two years from the effective date of this section only if such area can be acquired for not more than $800,000 . . ." 16 U.S.C. § 460u-12.[3]

The District Court initially took no action on the NIPSCO objections during the late Honorable Phil McNagy's tenure. Then on October 7, 1981, the case was set for pre-trial conference before a new Magistrate on the issue of damages. On October 26, 1981, NIPSCO filed a request for hearing on its objections again bringing them to the Court's attention so that on November 2, 1981, the Court by, the Honorable William Lee, acknowledged that the request for hearing was well taken, ordered the United States to file a brief in response, and generally continued the pre-trial conference until after a determination was made on the United States' authority to appropriate. On December 21, 1981, the United States filed its memorandum in response to objections Thereafter, as a result of a subsequent status conference before the Magistrate held January 4, 1982, the parties filed on January 12, 1982, a joint motion for extension of time regarding the existing trial setting based upon their mutual attempts to compromise by providing for a "scenic easement" in lieu of condemnation of the fee. The District Court granted the requested continuance and vacated the trial setting by order dated January 22, 1982.

On April 2, 1982, Council filed its Motion to Intervene as a Plaintiff under Fed. R. Civ. P. 24, along with the accompanying

[2]NIPSCO's Answer, Objections to Condemnation and Motion to Sustain Objections, Appendix to Brief, A-1.

[3]NIPSCO urged that the government's complaint improperly sought to condemn a quantum of land other than the authorized Area III-B and that the appraised value of Area III-B was above the $800,000, figure upon which acquisition was conditioned.

affidavit of Charlotte J. Read. Council's purpose was apparently to force the United States to condemn the land. NIPSCO filed a Response to Motion to Intervene and Motion to Strike the same together with a supporting memorandum on April 8, 1982. The Council replied with its Memorandum in Support of Motion to Intervene and Answers to Motion to Strike filed April 20, 1982.

A hearing on Council's Motion to Intervene was set for September 7, 1983. At that time the United States and NIPSCO entered into a stipulation and joint motion to dismiss. However, Judge Lee recused himself and Judge Allen Sharp heard the matter on October 20, 1983, receiving supplemental memoranda from the parties thereafter. On December 8, 1983, the District Court entered its order denying the intervention by Council and Council appealed

On February 22, 1985, the Seventh Circuit rendered its opinion affirming the denial of intervention by Council as a co-plaintiff in the condemnation of property owned by NIPSCO.

The Court's opinion stated in part:

> The Council cannot claim that its right to intervene derives from this sovereign authority to condemn property for public use. No entity, public or private, other than the legislature, can claim the sovereign authority to condemn property—a "direct, significant legally protectible interest"—unless Congress has delegated that authority to the party.[4]

This petition followed.

C. Factual Background.

The tract of land sought to be appropriated involved 36.96 acres bordering the southern edge of Lake Michigan. It was acquired in fee by NIPSCO together with other portions of its Michigan City Generating Station site from Industrial Land Company, Lake County, Indiana by deed dated June 3, 1932, and

[4] *United States* v. *36.96 Acres of Land*, 754 F.2d 855 (7th Cir. 1985).

recorded June 21, 1932, in Deed Record 160, pages 393-396, Document Number 20876 of the LaPorte County, Indiana records. NIPSCO's ownership of the real estate is subject to a Mortgage Indenture administered by Harris Trust and Savings Bank and R. G. Mason, Trustees to secure various bond instruments sold by NIPSCO. The parcel of property described as Area III-B in 16 U.S.C. § 460u-12 includes a 1,850 foot steel rock sea wall. The United States' complaint seeks appropriation of Area III-B "[e]xcepting from the above-described tract, the existing sea wall and land lying thereunder." The value of the land including the sea wall as disclosed by legislative history was at the time, approximately $1,762,000 or $962,000 more than the statutory limitation of $800,000. (Senate Report 94-1189, 1976 *U.S. Code Cong. and Adm. News* 5636-5637). At no time has the Council had any legal interest in the 36.96 acre parcel with or without the sea wall. None of its members has any legal authority or right to use the property for any purpose.[5]

II.
SUMMARY OF ARGUMENT

A. The petition fails to establish any "special and important" reason to grant a writ merely because it seeks to obtain intervention of an unrelated private party to monitor the United States' pursuit of an eminent domain proceeding.

B. In the absence of the power of eminent domain, or an ownership interest in the land the petitioner has no interest protectible under Fed. R. Civ. P. 24(a). Similarly, it has no standing to assert the environmental concern it expresses in unused land solely because it is privately owned by another.

C. The petitioner fails to establish an abuse of discretion by the District Court in denying permissive intervention or to establish error by the Seventh Circuit in affirming the same.

[5]See Complaint of the United States with attachments, Pet. for Cert., A-19.

III.

ARGUMENT

A. The Petition Fails to Advance Sufficient Reason to Grant The Writ

The granting of a writ of certiorari in response to Council's petition is discretionary in this Court when, as here, it is based upon 28 U.S.C. § 1254 (1). (Pet. for Cert.)[6] "[R]eview on writ of certiorari is not a matter of right", but a matter committed to the discretion of the Court, which is exercised "only when there are special and important reasons therefor." Sup. Ct. R. 17.1. As the petitioner, Council carries the burden of establishing "special and important" reasons sufficient to justify a grant of a writ of certiorari. *Gardner v. California,* 393 U.S. 367 (1969); Sup. Ct. R. 17.1.

Council fails to meet this burden since the petition fails to describe any "special" or "important" reason as set forth and fails to assert an adequate reason independent of Rule 17.1(a) worthy of the Court's review. The petition merely requests the Court to determine whether a federal court of appeals correctly applied Rules 24 (a) and (b) to the facts of this case. However, with respect to subparagraph (a) of that rule, the law is that "an application by a District Court of the Rules of Civil Procedure when affirmed by the Court of Appeals will not be reviewed by this Court," *Appalachian Power Company v. Am. Inst. of Certified Public Accountants,* 4 L.Ed.2d 30, 32 (1959), and with respect to subparagraph (b) the law is that a matter resting within the discretion of the District Court, such as the question of permissive intervention, cannot be certified. See, *United States v. Thomas,* 151 U.S. 577 (1984). Indeed, evaluation by this Court of whether an intervenor has satisfied the test of Rule 24 occurs only when

[6] 28 U.S.C. § 1254 (1) states in pertinent part:

> Cases in the Court of Appeals may be reviewed by the Supreme Court by . . . writ of certiorari granted upon the petition of any party to any civil . . . case.

some other substantive issue needs to be addressed at the national level such as the vindication of this Court's own order as law of the case, *Cascade Natural Gas Corp. v. El Paso Natural Gas,* 386 U.S. 129 (1967), or "because the case appeared to raise important questions relating to the administration and enforcement of the revenue laws . . ." *Donaldson v. United States,* 400 U.S. 517, 522 (1971). Thus, Sup. Ct. R. 17.1(a) makes plain this Court's "certiorari jurisdiction is designed to serve purposes broader than the correction of error in particular cases as sought here." *Watt v. Alaska,* 451 U.S. 259, 275 n.5 (1981) (Stevens, Jr. concurring).

Given these parameters, the Council attempts to create a "special" and "important" reason for granting the writ by charging that the Seventh Circuit's decision will "substantially undermine the ability of members of the affected public to seek judicial review of government action which frustrates a clear Congressional mandate . . ." However, this assertion mischaracterizes the status of Council, its relationship to the property, the actions of the United States and the purported Congressional mandate.

Council's status is that of a special interest group of private citizens who have, among other things, urged the expansion of the Indiana Dunes National Lakeshore. Its self-proclaimed role, does not change its private character nor do its pronouncements cause its activities to become vested with a greater public interest than that of any other private citizen. Indeed, no matter how intense the feeling of its members, Council is accorded the same status under the law as is the general public whose members may share equally intense but diverse views. *Westlands Water Dist. v. United States,* 700 F.2d 561 (9th Cir. 1983). Council's relationship to the land is non-existent. "With respect to this tract of land it is essentially a private citizen." *U.S. v. 36.96 Acres of Land, LaPorte County, Indiana,* 100 F.R.D. 78 (N.D. Inc. 1983). None of Council's members is able to assert that their use of the subject 36.96 acres is other than a trespass. Conversely, NIPSCO's sole

ownership is irrelevant to the rights of the Council and NIPSCO's ownership has no impact upon Council's members. Analytically then, the interest which Council asks to have recognized is really not a present interest at all but rather an effort to obtain a protectible interest in the future by making private lands public. Such an effort to convert a present political design into a future protectible legal interest is a use of Rule 24 that this Court must eschew. See *Sierra Club v. Morton,* 405 U.S. 727 (1972).

Council's characterization of the United States' action as a frustration of a Congressional mandate is also a red herring. It is the intent of Congress as evidenced by 16 U.S.C. § 460 u-12, that the subject 36.96 acres of property shall be acquired by the Secretary of the Interior for the National Lakeshore only upon fulfilling three conditions.

> The Secretary shall acquire the area on the map referred to in section 460u of this title as area III-B within two years from the effective date of this section only if such area can be acquired for not more than $800,000, exclusive of administrative costs of acquisition, as adjusted by the Consumer Price Index: Provided, that the Secretary may not acquire such area by any means after two years from the effective date of this section.
>
> 16 U.S.C. § 460 u-12.

These Congressionally mandated conditions to acquisition were not fulfilled by the United States. First, the tract of land described in the statute, designed as Area III-B, includes a sea wall improvement yet the United States excluded this valuable improvement in its complaint. Second, the entire Area III-B tract of land had to be acquired within two years after which the property could not be acquired "by any means." Third, the Secretary was barred from making the acquisition of the tract of land described as Area III-B unless it could be procured for not more than $800,000, a figure less than the condemnor's appraisal or the value given the Senate Report. See ante, p. 4. Review of the

record in these proceedings demonstrates that the Secretary of the Interior rather than fulfill the mandate of Congress attempted to act beyond that mandate. Indeed, the United States' attempt to proceed in eminent domain without having fulfilled the conditions for authorization raised due process objections from NIPSCO for which the Secretary of the Interior could be responsible under the *Uniform Relocation Assistance Real Property Acquisition Policies Act of 1970,* 42 U.S.C. § 654. A private party, attempting to intervene as a putative plaintiff, Council would avoid this liability while by its actions expose the United States. Perhaps for these reasons the United States sought its favorable dismissal stipulation with NIPSCO. For similar reasons, "[i]t would be absurd to allow the unilateral conduct of private parties to divest the United States of control over its own litigation." *Rosebud Coal Sales Co. v. Andrus,* 644 F.2d 846, 851 (10th Cir. 1981).

Thus, despite Council's characterizations, the only significance a grant of certiorari might have would be to allow the petitioner, a private party, to monitor the United States' pursuit of an eminent domain proceeding otherwise foreclosed by 16 U.S.C. § 460 u-12, the weakest of reasons to burden further this Court's scarce resources, and a reason which is neither "special" nor "important." See, *Singleton v. Commissioner,* 439 U.S. 940 (1978) (Stevens, Jr., opinion respecting the denial of the petition for writ of certiorari). Accordingly, the Council's petition for writ of certiorari should be denied for its failure to present an issue worthy of this Court's determination.

B. The Seventh Circuit Properly Affirmed the Denial of Intervention Under Federal Rule 24 (a)(2)

The Seventh Circuit was correct to deny the intervention because the Council failed to meet the requirements of Rule 24(a)(2). To intervene as of right the proposed intervenor must demonstrate that its motion was timely filed; that it has an interest relating to the property or transaction which is the subject of the

action; that the disposition of the action may as a practical matter impair or impede its ability to protect that interest; and that the interest is not adequately represented by existing parties. Fed. R. Civ. P. 24(a). Since all four requirements of the rule must be met before intervention of right will be allowed, *NAACP v. New York*, 413 U.S. 345, 369 (1973), the Seventh Circuit's conclusion that Council had no "direct, significant legally protectible interest" was determinative and the predicate for questioning the scope of protection or other issues under the rule evaporated. If Council has no interest in the pending litigation to warrant intervention as of right *a fortiori* Council cannot claim any impairment in its ability to protect that noninterest.

The history of the amendments to Rule 24 and this Court's discussion of the rule since the 1966 amendments, in *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967) and *Donaldson v. United States*, 400 U.S. 517 (1971) evidence a desire to attach some measure to the practical consequences felt by a potential intervenor if excluded from the litigation. Nevertheless, this process still requires identification of a "direct, substantial, legally protectible interest in the proceedings" as a threshold question. *Hobson v. Hansen*, 44 F.R.D. 18, 24 (D.C.D.C. 1968). Thus, the "[interest] requirement should be viewed as a prerequisite" and in this sense, it is still the determinative criterion for intervention. *Smuck v. Hobson*, 408 F.2d 175, 182 (D.C. Cir. 1969).

This Court's *Cascade* decision, recognized the concept of an economic interest as a condition for intervention. In *Cascade* the majority was concerned with whether a decree agreed upon by the Attorney General and the gas companies and approved by the District Court, properly carried out the Supreme Court's prior mandate that certain distribution assets be in the custody of a new company on the theory that such an allocation would be conducive to greater gas competition in California. Under such circumstances, it was felt the Cascade Natural Gas Company had

an important economic interest in obtaining a decree that assured the existence of its sole supplier as a feasible enterprise in the future.

> [T]he circumstances under which interested outsiders should be allowed to become participants in a litigation is, barring very special circumstances, a matter for the *nisi prius* court. But where the enforcement of a public law also demands distinct safeguarding of private interests by giving them a formal status in the decree, the power to enforce rights, thus, sanctioned is not left to the public authorities nor put in the keeping of the district court's discretion.
>
> *Cascade Natural Gas Corp. v. El Paso Natural Gas Co., supra,* at 135 quoting *Missouri-Kansas Pipeline Co. v. United States,* 312 U.S. 502, 506 (1941).

Thus, in *Cascade* this Court found an economic interest in the transaction sufficient to warrant focus on the remaining elements of practical harm to the applicant and the adequacy of representation by others upon which intervention was ultimately allowed.

In *Donaldson v. United States, supra,* this Court spoke more directly to the language of Rule 24(a). There the plaintiff had unsuccessfully sought intervention in a summary tax proceeding to prevent disclosure by third parties of their records which might implicate him relative to his tax liability. The unanimous Court concluded that the records sought by the subpoenas were the employer's routine business records in which Donaldson had no proprietary interest of any kind and regarding which he could make no claim of privilege.

> The nature of the "interest" urged by the taxpayer is apparent from the fact that the material in question (once we assume its relevance) would not be subject to suppression if the Government obtained it by other routine means, such as by Acme's independent and voluntary disclosure prior to summons, or by way of identifiable deductions in Acme's own income tax returns, or through Mecurio's appearance as a trial witness, or by subpoena of the records for trial. This interest

> cannot be the kind contemplated by Rule 24(a)(2) when it speaks in general terms of "an interest relating to the property or transaction which is the subject of the action." What is obviously meant there is a significantly protectible interest.
>
> *Id.* at 531.

The Seventh Circuit's determination of the instant case in reliance upon its precedent in *Wade v. Goldschmidt,* 673 F.2d 182, 185 (7th Cir. 1982) takes full cognizance of these Supreme Court pronouncements regarding intervention. *Wade* requires "a direct, significant legally protectible interest in the property or transaction," before intervention will be allowed. It considers as closely related issues the nature of an intervenor's interest in the property or transaction and the effect that the disposition of the action may have on his ability to protect that interest. *Hobson v. Hansen, supra,* at 30. 7A C. Wright & A. Miller, *Federal Practice and Procedure,* § 1913, at 551–52 (1972). Further *Wade* states that:

> . . . an interest to satisfy the requirements of Rule 24(a)(2) must be significant, must be direct rather than contingent, *and must be based on a right which belongs to the proposed intervenor rather than to an existing party to the suit.*
>
> *Id.* at 185n.5 citing In re *Penn Cent. Commercial Paper Litigation,* 62 F.R.D. 341, 346 (1974). (Emphasis added).

Thus, in accord with *Wade* the Seventh Circuit made an analysis of the significance of the interest sought to be vindicated, the standing of the proposed intervenor to assert a right with respect to that interest and the relationship of the proposed intervenor's ostensible right to vindicate that interest relative to the original parties' rights. See, *Heymen v. Exchange National Bank of Chicago,* 615 F.2d 1190 (7th Cir. 1980). Council's Motion to Intervene failed in each of these areas of focus and the Seventh Circuit properly followed its *Wade* holding as a statement of the law.

1. Absent The Power Of Eminent Domain Or An Ownership Interest In The Subject Parcel The Council Has No Significant Interest In The Pending Litigation.

An eminent domain proceeding considers only two legal interests. The first is that held by the sovereign to exercise the power of eminent domain. *United States v. Carmack*, 329 U.S. 230, 236 (1946). It is not shared by a private party being peculiar to the sovereign in a manner different from certain administrative, regulatory or police power functions. See, *United States v. 58.16 Acres of Land, Etc.*, 478 F.2d 1055 (7th Cir. 1973). The sole question to be determined relative to the sovereign's power or "interest" concerns whether Congress has granted specific authority to make the appropriation sought for a public use. Congress alone has discretion to exercise or delegate the power of eminent domain. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 586–86 (1952).

> Once the question of the public purpose has been decided the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislature branch.
>
> *Berman v. Parker*, 348 U.S. 26, 35–36 (1954).

In this case, the authorization given by Congress to the Secretary of the Department of the Interior contains specific and detailed conditions limiting the circumstances under which property adjoining the National Lakeshore can be appropriated. This is the "interest" of the sovereign in the pending litigation as expressed in the Indiana Dunes National Lakeshore Act, 16 U.S.C. § 460 u *et seq.*, and it is an interest that the Secretary may or may not wish to pursue in contesting NIPSCO's position that the United States acted outside the scope of Congressional authority. Council cannot claim that its right to intervene derives from this sovereign authority to condemn property for a public use. No entity, public or private can claim the sovereign authority to condemn

property unless Congress has delegated it such authority. *Youngstown Sheet & Tube, supra,* at 585. Nor can Council claim to have some special relationship with the sovereign *vis-a-vis* NIPSCO which would allow it to intervene as a plaintiff to dispossess the private owner. In short Council has no legally protectible interest in whether the United States exercises its exclusive power to eminent domain or whether the United States in these proceedings should contest NIPSCO's legal objection to the purported right to take.

The second legal interest in an eminent domain proceeding is one of private ownership. The Fifth Amendment mandates that (a) "No person shall . . . be deprived of . . . property, without due process of law"; (b) "nor shall private property be taken for public use, without just compensation." See, *Berman v. Parker, supra* at 31. Here, the ownership interest is exclusively in NIPSCO. As the District Court found, "the party with the paramount interest, indeed, the only legal interest in the land at issue is NIPSCO." (Pet. for Cert. A-18). No less an interest is protectible in this *in rem* action brought against the land itself. Fed. Rules Civ. Pro. 71 A(c). Indeed, under due process standards, it is NIPSCO, which is entitled to judicial review of the United States' action not the Council. See, *Shoemaker v. United States,* 147 U.S. 282 (1893).

Under these circumstances, to allow a private party to intervene as a plaintiff representing a putative interest in a federal eminent domain proceeding would be to abandon the language of Rule 24. There is no justification in *Cascade Natural Gas Corp. v. El Paso Natural Gas, supra,* to support this given Council's lack of an economic interest. Likewise, Council can claim no "significantly protectible interest" relating to the proceedings under *Donaldson v. United States, supra.* Indeed, applicable to these circumstances is the requirement that the potential intervenor's interest must be the same as that described for determining whether one is the "real party in interest" as that term is used in Fed. R. 17 (a). See, *United States v. 936.71 Acres of*

Land, Etc., 418 F.2d 551, 556 (5th Cir. 1969). This would designate only those parties capable of intervention "who by substantive law, possess the right sought to be enforced." *Id.* at 556. Council acknowledges this standard by stating that its interest must be "substantive and specific, distinguishable from policy concerns of the general public." (Pet. for Cert. p. 17). Manifestly it cannot meet these standards, and thus, is foreclosed from intervention.

2. Council Has No Standing To Assert The Environmental Concern It Expresses In These Proceedings

Whether a would-be intervenor has the required interest in the subject matter of the litigation is in part a question of standing. *Fred Harvey, Inc. v. Mooney*, 526 F.2d 608, 613 (7th Cir. 1975). While an intervenor need not demonstrate the same degree of standing as that required to initiate litigation, he must nevertheless have his own injury at stake in the lawsuit before he can intervene. "[B]roadening the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury." *Sierra Club v. Morton, supra*, at 738.

Council fails this standing test being unable to demonstrate injury to itself or its members through NIPSCO's ownership of Crescent Dune. Council's "intense concern for the National Lakeshore" and "its members' personal aesthetic conservational and recreational interest in the property" create no legal right in the Council to change the ownership of the property in question. (See Pet. for Cert. App. 5). This Court rejected Sierra Club's similar argument regarding its members' putative interest in the administration of federally owned land stating:

> Some courts have indicated a willingness to take this latter step [abandoning the requirement that the party seeking review must himself have suffered an injury] by conferring standing upon organizations that have demonstrated an "organizational interest in the problem" of environmental or consumer protection.

> But a mere "interest in a problem," no matter how long-standing the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization "adversely affected" or "aggrieved" . . .
>
> [I]f a "special interest" in this subject were enough to have entitled the Sierra Club to commence this litigation, there would appear to be no objective basis upon which to disallow a suit by any other bona fide "special interest" organization, however small or short-lived. And if any group with a bona fide "special interest" could initiate such litigation, it is difficult to perceive why any individual citizen with the same bona fide special interest would not also be entitled to do so.
>
> *Id.* at 738–39.

Council conspicuously ignores both the holding in *Sierra Club* that there was no standing in the plaintiff despite the intense concern of its members in environmental issues, and the rationale behind *Sierra Club*, that the members could demonstrate no actual use of the federally owned lands or unique interest in the proposed use by others to warrant recognition of the Club's asserted "aesthetic, conservational and recreational values." In this context, NIPSCO's private ownership of Crescent Dune forecloses any claim by Council of actual harm to its members in the use of the property. Likewise, NIPSCO's continued ownership causes no deprivation to Council's members of any "aesthetic, conservational, and recreational values."

Glossing over the distinction between standing to mandate the preservation of the existing National Lakeshore and standing to condemn additional private property for it, works an injustice to the respective rights of private parties and to a system which protects them from the interference of others.

> The requirements that a party seeking review must allege facts showing that he is himself adversely affected does not insulate executive action from judicial review, nor does it prevent any public interests from being protected through

> the judicial process. It does serve as at least a rough attempt to put the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome. That goal would be undermined were we to construe the APA to authorize judicial review at the behest of organizations or individuals who seek to do no more than vindicate their own value preferences through the judicial process. The principle that the Sierra Club would have us establish in this case would do just that.
>
> *Sierra Club v. Morton, supra,* at 740.

The Seventh Circuit's reliance upon its *Wade v. Goldschmidt,* holding that the right asserted belong "to the proposed intervenor rather than to an existing party" addresses this fundamental aspect of standing. "Intervention as of right presupposes that the applicant has a right to maintain a claim for the relief sought . . ." *Solien v. Miscellaneous Drivers & Helpers U. Loc. No. 610,* 440 F.2d 124, 132 (8th Cir. 1971). Here the moving party does not have the independent right to maintain the claim. Accordingly, since Council could not have brought the original action in eminent domain proceedings to dispossess NIPSCO and since Council can demonstrate no "discrete and palpable" injury in NIPSCO's continued ownership of Crescent Dune, it has no standing to intervene. *Worth v. Seldin,* 422 U.S. 490, 501 (1975).

C. THE DISTRICT COURT PROPERLY DENIED COUNCIL'S MOTION FOR PERMISSIVE INTERVENTION UNDER FEDERAL RULE 24(b)

To qualify for permissive intervention the proposed intervenor should demonstrate both that his claim is timely and that the claim and the main claim "have a question of law or fact in common." Further he must show the intervention "will [not] unduly delay or prejudice the adjudication of the rights of the original parties." Fed. R. Civ. P. 24(b). Within these criteria, permissive intervention is wholly discretionary with the District Court. *Brewer v. Republic Steel Corp.,* 513 F.2d 1222 (6th Cir. 1975).

"It is said that it is a discretion that is to be exercised 'carefully,' but it is well-settled that an appellate court can interfere, if at all, only for an abuse of discretion." 7A.C. Wright and A. Miller, *Federal Practice and Procedure*, § 1913, at 551–52 (1972); *EEOC v. United Air Lines, Inc.*, 515 F.2d 946 (7th Cir. 1975).

> The question on appeal . . . is not whether those factors [of permissive intervention] were present, but whether the trial court committed a clear abuse of discretion in denying the motion.
>
> *Korioth v. Briscoe*, 523 F.2d 1271, 1278 (5th Cir. 1975) citing *Allen Calculators, Inc. v. National Cash Register Co.*, 322 U.S. 137 (1944).

In the case at bar the District Court correctly held that permissive intervention would be inappropriate. As previously noted, none of Council's requests are cognizable in an eminent domain proceeding. Council has no power to condemn and it has no ownership in the subject property. Thus, none of the proposed intervenor's claims and the present action have a question of law or fact in common such as would satisfy the requirement for permissive intervention under the rule. *Wade v. Goldschmidt, supra*, at 187. Similarly, when as here, the original parties have jointly moved for a dismissal of the action, Council's attempt to continue the litigation "will unduly delay or prejudice the adjudication of the rights of the original parties." Fed. R. Civ. P. 24(b).

Permissive intervention must also be denied Council because there is no independent jurisdictional ground upon which Council has access to the federal courts. *Babcock & Wilcox Co. v. Parsons Corp.*, 430 F.2d 531 (8th Cir. 1970). Unlike intervention as of right which being ancillary to the original proceeding relies upon it for jurisdiction, "permissive intervention in an *in personam* action other than a class action must be supported by independent grounds . . ." *Reedsburg Bank v. Apollo*, 508 F.2d 995, 1000 (7th Cir. 1975). Since Council is an Indiana corporation, as is NIPSCO, and since Council cannot share with the United States

an eminent domain authority, or its *in rem* status, neither diversity nor federal question grounds are available to support the independent jurisdiction required for permissive intervention. See, *Toles v. U.S.*, 371 F.2d 786 (10th Cir. 1967). There, in an action by the United States to confirm the taking of land and to determine just compensation, the grantees of landowners could not intervene to assert a claim against their grantors who were defendants since their claim was independent of the original action and diversity was lacking between the grantors and grantees.

In the same jurisdictional context, a permissive intervenor must also file with his motion a proposed complaint within the time of any applicable statute of limitation. *Jack v. Travelers Insurance Co.*, 22 F.R.D. 318, 319 (E.D. Mich. 1958). Filing of a timely complaint with respect to a permissive intervenor is thus not only procedurally required in Rule 24(c) but also substantively required to legitimize the intervenor's independent claim. *Securities & Exch. Com'n v. Keller Bros. Securities Co.*, 30 F.R.D. 532 (D.C. Mass. 1902).

In this case, Council has filed its alleged claim after the limitation period set forth in 16 U.S.C. § 460 u-12. According to the statute, Area III-B must be acquired within two years of its effective date, October 18, 1976. See, 16 U.S.C. § 460 u-12, Anno. 1. Since Council's Motion to Intervene and Proposed Complaint were filed April 2, 1983, three and one half years after the October 18, 1978 deadline, its claim is insufficient to withstand summary dismissal as a matter of law. Fed. R. Civ. P. 24(c); *United States v. 635.75 Acres of Land, Etc.*, 319 F.Supp. 763, 766 (W.D. Ark. 1970). Under such circumstances there is no abuse of discretion in the District Court's denial of permissive intervention.

IV

CONCLUSION

Because the lower court adhered to the legal criteria required in denying the intervention and because Council has failed to provide a sufficient reason why this Court should grant certiorari, the petition should be denied.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

vs.

36.95 ACRES OF LAND, MORE OR LESS, SITUATED IN THE COUNTY OF LAPORTE, STATE OF INDIANA, and NORTHERN INDIANA PUBLIC SERVICE COMPANY, an Indiana corporation, et al, and UNKNOWN OWNERS,
Defendants.

CIVIL NO. H 78-317
TRACT NO. 96-101

ANSWER, OBJECTIONS TO CONDEMNATION AND MOTION TO SUSTAIN OBJECTIONS

The defendant, Northern Indiana Public Service Company, objects to the attempt of the United States of America to take its property and as such objection, alleges and says:

1. The defendant's land is described in the complaint in condemnation as "A tract of land situated in the Southeast Quarter, Section 30 and the Northeast Quarter, Section 31, Township 38 North, Range 4 West, 2nd Principal Meridian, being more particularly described as follows:

> All that part of the Southeast Quarter of said Section 30, and that part of the Northeast Quarter of said Section 31, lying Northwesterly of a line described as follows: Commencing at the northwest corner of the Northeast Quarter of said Section 31; thence South, along the North-South centerline of said Sections 30 and 31, 263.14 feet, more or less, to the Northern right of way line of an existing 132 KV tower line right of way; thence North 36°16′ East, to the south line of said Section 30; thence continuing North 36° 16′ East, 2,750.00 feet; thence at right angles to the last described line, Northwesterly to the Water's edge of Lake Michigan. Excepting from the above described tract, the existing sea wall and land lying thereunder.

Said tract contained 36.95 acres, more or less."

CERTIFICATE OF FILING
CERTIFICATE OF SERVICE

Pursuant to Sup. Ct. R. 28.5(b) I, Paul A. Rake, a member of the Bar of this Court representing Northern Indiana Public Service Company, the Respondent herein, hereby certify that on the 11th day of October, 1985 in accordance with Sup. Ct. R. 28.2 and 28.3, I deposited in the United States post office located at 433 W. Van Buren, Chicago, Illinois 60607, with first-class postage prepaid, 41 printed copies of the Respondent Northern Indiana Public Service Company's Brief in Opposition to the Petition for Writ of Certiorari, addressed to the Clerk of the United States Supreme Court for filing and further by the same method served 3 printed copies of the same to the following counsel:

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Supreme Court, U.S.
FILED
NOV 25 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-426

In the Supreme Court of the United States

OCTOBER TERM, 1985

SAVE THE DUNES COUNCIL, INC., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BEST AVAILABLE COPY

QUESTION PRESENTED

Whether an environmental group, which does not own the property involved in a condemnation suit, has a sufficiently direct and substantial interest to intervene as of right in the condemnation action pursuant to Fed. R. Civ. P. 24(a).

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A12) is reported at 754 F.2d 855. The opinion of the district court (Pet. App. A14-A18) is reported at 100 F.R.D. 78.

JURISDICTION

The judgment of the court of appeals was entered on February 22, 1985. A petition for rehearing was denied by corrected order on April 4, 1985. The petition for a writ of certiorari was filed on June 24, 1985, and was served on the United States on September 16, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves petitioner's attempt to intervene in a condemnation case filed by the United States against the Northern Indiana Public Service Company (NIPSCO). The land that is the subject of the condemnation action is a 36.96-acre tract, bordering the southern edge of Lake Michigan. The tract is part of an area, commonly known as Crescent Dune, that lies between the Indiana Dunes National Lakeshore on the west and one of NIPSCO's generating stations on the east (Pet. App. A2).

In 1978, the United States instituted this condemnation action in the United States District Court for the Northern District of Indiana pursuant to the Indiana Dunes National Lakeshore Act, 16 U.S.C. 460u-12. That statute had been amended in 1976 to authorize the Secretary of the Interior to acquire Crescent Dune. Section 460u-12 strictly limited the Secretary's condemnation authority by prescribing a maximum cost of $800,000 and specifying that the Secretary could not acquire the property "by any means after two years."

The value of the entire parcel had been estimated as $1,762,000 in 1976 (Pet. App. A2). When the government commenced these proceedings it set the value of the portion it sued to condemn at $277,000 (see Pet. App. A27-A28). NIPSCO filed objections to the condemnation action, contending that the government was not authorized to acquire only part of Crescent Dune, but had to acquire all of it.[1] NIPSCO also argued that the two-year time limitation set out in the statute applied to the actual acquisition of the site and not merely the time in which to file a condemnation action.

In 1982, petitioner filed a motion to intervene in the condemnation action, and, in 1983, filed complaints for mandamus against the Secretary of the Interior in the

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[1] A sea wall was excluded from the area sought in the condemnation proceeding (see Pet. App. A27-A28).

United States District Court for the District of Columbia[2] and in the Northern District of Indiana. These mandamus complaints are still pending.

On September 7, 1983, the government and NIPSCO submitted to the district court a stipulation and joint motion to dismiss the condemnation action (Pet. App. A48-A49). Following a hearing, the district court denied petitioner's motion to intervene.

A divided panel of the United States Court of Appeals for the Seventh Circuit affirmed the district court's order denying intervention as of right and denying permissive intervention (Pet. App. A1-A12). The court concluded that petitioner failed to show that it had an interest in the property sufficient to warrant intervention.

ARGUMENT

The judgment of the court of appeals is correct, does not conflict with the decisions of this Court or of any other court of appeals, and does not merit further review.

1. Fed. R. Civ. P. 24(a) specifies four requirements that must be met by a party seeking intervention as of right: (1) the application for intervention must be timely; (2) the intervenor must show an interest relating to the property or transaction that is the subject of the action; (3) the intervenor must show that the disposition of the action may as a practical matter impair or impede the intervenor's ability to protect that interest; and (4) the intervenor must show that its interest is not adequately represented by existing parties.

The district court found that, although the Council's application for intervention was timely, it failed to meet the other three requirements. The Seventh Circuit affirmed, focusing on petitioner's failure to show that it had a

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[2] On March 13, 1984, Judge Sirica transferred the case filed in the District of Columbia to the Northern District of Indiana.

sufficient interest in the property.[3] The court correctly noted that, under *Donaldson* v. *United States*, 400 U.S. 517, 531 (1971), a would-be intervenor must assert a "significantly protectable interest" in the pending action. Other courts of appeals have echoed this principle by requiring "a direct, substantial, legally protectable interest in the proceedings." *New Orleans Public Service, Inc.* v. *United Gas Pipe Line*, 732 F.2d 452, 463 (5th Cir. 1984) (citation omitted). Accord *Athens Lumber Co.* v. *Federal Elections Commission*, 690 F.2d 1364, 1366 (11th Cir. 1982); *Wade* v. *Goldschmidt*, 673 F.2d 182, 185 (7th Cir. 1982); *Dilks* v. *Aloha Airlines, Inc.*, 642 F.2d 1155, 1157 (9th Cir. 1981); *Heyman* v. *Exchange National Bank*, 615 F.2d 1190, 1193 (7th Cir. 1980).

2. Petitioner contends that, despite the clear language in *Donaldson*, this Court's opinion in *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129 (1967), provides a more liberal standard for intervention. In that case, the Court held that a state government and a large industrial user of natural gas could intervene as of right in a government antitrust suit under Rule 24(a)(3), as it existed prior to the 1966 amendments. It also held that a gas distributor could intervene as of right under current Rule 24(a)(2). To the extent that *Cascade* suggests a broadening of intervention rules, the Court's later and more limited reading of Rule 24 in *Donaldson* is controlling.

Moreover, despite its repeated claim of a conflict in authorities, petitioner cites no case in which a party that had no legally protectable interest in the property was permitted to intervene in a condemnation case. As the Seventh Circuit pointed out, there are only two legal interests at stake in an eminent domain proceeding. The first is that of the sovereign. The power of eminent domain is essential to the government (*United States* v. *Carmack*,

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[3] The Seventh Circuit did not address the remaining two requirements for intervention as of right.

329 U.S. 230, 236 (1946)) and authority to initiate a condemnation action resides in the legislative branch, which in turn, often delegates this authority to executive branch agencies such as the Department of the Interior. Since only the legislature or its delegates may exercise the power of eminent domain (*Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579 (1952)) no private citizen or organization may sue to condemn property unless Congress has so authorized. The role of the judicial branch in reviewing the sovereign's actions in condemnation cases is quite narrow. *Berman* v. *Parker,* 348 U.S. 26, 32 (1954). Thus, courts may determine whether a taking is for a public purpose, but the judicial role does not encompass reviewing whether the taking was necessary or whether the quantity of land taken was appropriate. *Story* v. *Marsh,* 732 F.2d 1375, 1384 (8th Cir. 1984); *Lower Brule Sioux Tribe* v. *United States,* 712 F.2d 349, 353 (8th Cir. 1983). The second interest at stake in a condemnation action is that of the landowner. The landowner's interests include whether the taking is for a public purpose under a proper delegation of authority from Congress and whether the amount of compensation is just.[4]

In contrast, petitioner has no "significant, protectable interest" in this condemnation action. See *In re Penn Central Commercial Paper Litigation,* 62 F.R.D. 341, 346 (S.D.N.Y. 1974), aff'd without opinion, 515 F.2d 505 (2d Cir. 1975) (Table) (in order to intervene, a party must

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[4] In some condemnation cases, although not in this case, the government uses the more streamlined procedure of filing a declaration of taking, which immediately vests title in the United States. No proposed land use plans or other governmental actions are at issue in any condemnation proceeding. Yet if groups like petitioner were permitted to intervene in cases where a declaration of taking had been filed or, indeed, in any condemnation case, the intended benefits of such procedures would be seriously undermined and litigation would be expanded beyond its proper focus—the assessment of just compensation due the landowner.

assert an interest based on a right that belongs to him, not a right that belongs to the existing parties). Accord *New Orleans Public Service, Inc.* v. *United Gas Pipe Line,* 732 F.2d at 464-465. Indeed, even in contexts other than condemnation proceedings, courts have denied intervention to parties whose interests were similar to petitioner's. See *Westlands Water District* v. *United States,* 700 F.2d 561 (9th Cir. 1983); *Allard* v. *Frizzell,* 536 F.2d 1332 (10th Cir. 1976); *Wade* v. *Goldschmidt,* 673 F.2d 182 (7th Cir. 1982). Accordingly, the decision denying intervention was unexceptional and does not merit further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1985

MOTION FILED
NOV 15 1985

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NO. 85-426

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

SAVE THE DUNES COUNCIL, INC.,

Petitioner,

and

UNITED STATES OF AMERICA,

Respondent,

v.

36.96 ACRES OF LAND, MORE OR LESS, SITUATED IN THE COUNTY OF LAPORTE, STATE OF INDIANA, AND NORTHERN INDIANA PUBLIC SERVICE COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE BRIEF OF SIERRA CLUB AS AMICUS CURIAE SUPPORTING PETITIONER
and
BRIEF OF SIERRA CLUB AS AMICUS CURIAE SUPPORTING PETITIONER

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November 15, 1985

BEST AVAILABLE COPY

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MOTION FOR LEAVE TO FILE BRIEF OF SIERRA CLUB AS AMICUS CURIAE SUPPORTING PETITIONER

Sierra Club respectfully moves, pursuant to Supreme Court Rule 36.1, for leave to file the attached Brief of

Sierra Club as Amicus Curiae Supporting Petitioner.

Sierra Club is an environmental conservation organization with in excess of 350,000 members. The Club has local chapter and membership groups which, from time to time, become involved and interested in local conservation issues.

Like Petitioner, Save the Dunes Council, Inc. (hereinafter "Council"), the Club has been directly involved with issues of land acquisition and management. Although the Club often lacks a narrow legal or equitable ownership interest in the land at issue, the Club, nevertheless, is interested in land use and conservation, and the effective performance of congressionally authorized or mandated duties of the Secretary of the Interior. To protect its identifiable interests, the Club has

participated in litigation, both as plaintiff and intervenor.

The decision of the Seventh Circuit is an announced departure from the decisions of this Court and other circuits regarding intervention of right under Fed. R. Civ. P. 24(a)(2). The decision below may seriously impede the ability of the Club and its members to seek adequate representation in actions that may impair their demonstrable interests. Because of the potentially adverse impact of the Seventh Circuit decision on the legitimate right of the Club and its members to intervene in appropriate cases, the Club should be allowed to participate as an amicus curiae.

Neither the Secretary of the Interior nor Northern Indiana Public Service Company (hereinafter "NIPSCO") will

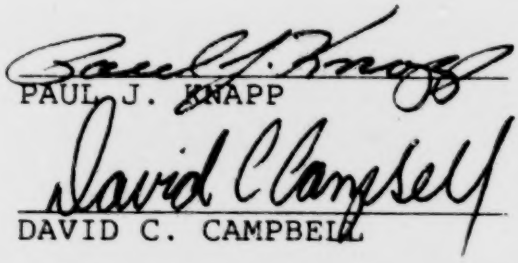
adequately address the scope of the Seventh Circuit decision beyond its narrow limits. The Council's interest is limited, as it should be, to the particular issues surrounding the Indiana Dunes National Lakeshore. The Club's participation, as amicus, would be helpful to the Court in exploring the broader implications of the decision below not only in placing the decision in proper historical context of the developing law of intervention but also in understanding its precedential effect.

Although the Council and the Solicitor General, on behalf of Respondent, United States of America, consented to the filing of an amicus curiae brief by Sierra Club, Respondent, NIPSCO, refused to give its consent. Therefore, Sierra Club respectfully moves this Court for leave to file the attached

Brief of Sierra Club as Amicus Curiae

Supporting Petitioner.

Respectfully submitted,



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INTEREST OF AMICUS CURIAE

Amicus curiae Sierra Club is a nonprofit corporation organized and existing under and by virtue of the laws of the State of California, having its principal place of business at 530 Bush Street, San Francisco, California 94108. The Sierra Club is a national conservation organization with membership in excess of 350,000.

The objectives of the Sierra Club include conservation, the protection and sound management of natural resources, and the preservation and enhancement of the environment. The stated corporate purposes of the Sierra Club are:

> To enhance and protect by all lawful means the natural resources and human environment of the United States and the earth in general; to explore, enjoy and preserve the scenic resources of the United States and its forests, waters, wild life and

> wilderness; to undertake and to publish scientific, literary, and educational studies concerning them; to educate the people with regard to the national and state forests, parks, monuments, and other natural resources of especial scenic beauty and to enlist public interest and corporation in protecting them.

The Club's members pursue many diverse outdoor recreational pursuits on the public lands, including hiking, boating, nature study and camping. These outdoor recreational pursuits depend in large measure on the Secretary of Interior's effective performance of land acquisition and management duties authorized by Congress, including those of 16 U.S.C. section 460u-12.

The procedural vehicle of intervention allows the Club and its members to seek adequate representation in actions which could impair their interests. The Seventh Circuit's

decision below, denying the Save The Dunes Council, Inc. (hereinafter "Council") the right to intervene in an action brought pursuant to 16 U.S.C. section 460u-12, severely undermines the vitality of Rule 24. The Seventh Circuit decision misapplies the "interest" requirement of Rule 24(a)(2), overlooks the Rule's underlying policy, conflicts with decisions of this Court and other Circuits and most certainly will have a deleterious effect on the ability of the Club and other groups whose demonstrable interest is not adequately represented from properly intervening in actions in which their interest will or may be impaired.

REASON FOR GRANTING THE WRIT

THE SEVENTH CIRCUIT'S ANALYSIS OF THE NATURE OF THE "INTEREST" REQUIRED TO INTERVENE IS CONTRARY TO DECISIONS OF THIS COURT AND CONFLICTS WITH DECISIONS OF OTHER CIRCUITS AND THE POLICIES THAT UNDERLIE RULE 24

The Seventh Circuit's analysis of whether a particular interest is sufficient for the purpose of intervention is fundamentally flawed because it excludes all interests except traditionally recognized legal interests.

In the instant case, the Seventh Circuit looked to the nature of the underlying proceeding, eminent domain, and identified only the two traditional "legal" interests involved in such an action. Because the Council possessed neither the eminent domain power of the sovereign nor a private ownership interest in the property being condemned, the Seventh Circuit held that the Council

lacked "direct, significant legally protectable interest" required for intervention. United States v. 36.96 Acres of Land, 754 F.2d 855, 859 (7th Cir. 1985).

This narrow interpretation of "interest relating to the property or transaction," Fed. R. Civ. P. 24(a)(2), is precisely what this Court in Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129, 133 (1967), rejected as an overly restrictive interpretation of even the pre-1948 Rule 24:

> Under old Rule 24(a)(3) those "adversely affected" by a disposition of property would usually be those who have an interest in the property. But we cannot read it to mean exclusively that group.

Noting the elasticity of the Rule, the Court in Cascade suggested one approach to identifying "interest": look to interests which go to the "heart of

the controversy." Id. at 135. See also Missouri-Kansas Pipeline Co. v. United States, 312 U.S. 502, 506 (1941) (intervention permitted where applicants risked economic damage but had no direct legal interest in the underlying transaction). Thus, the notion that only traditional legal interests are sufficient for intervention of right has been rejected.

The Seventh Circuit's reliance on Donaldson v. United States, 400 U.S. 517 (1971), is unavailing. Nothing in Donaldson supports the proposition that only a traditional legal right in a disputed property or transaction meets the interest test. Donaldson's contribution to the interpretation of Rule 24(a)(2) is to define "interest" as requiring "a significantly protectable interest." Id. at 531. This Court has recognized that certain nontraditional

interests, including environmental interests, are indeed significant protectible interests, at least in the context of standing. Sierra Club v. Morton, 405 U.S. 727 (1972); United States v. SCRAP, 412 U.S. 669 (1973); Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59 (1978). Contrary to the decision below, it is well established that the interest requirement for intervention is less stringent than the interest requirement for standing. Trbovich v. United Mine Workers, 404 U.S. 528 (1972). In fact, the Seventh Circuit previously so held. United States v. Board of School Commissioners, 466 F.2d 573, 577 (7th Cir. 1972), cert. denied sub nom. Citizens of Indianapolis for Quality Schools v. United States, 410 U.S. 909 (1973).

Although this Court has not addressed the specific issue of whether environmental interests are significantly protectible interests in the context of Rule 24, the Ninth Circuit has addressed the issue and its decisions are in sharp conflict with the Seventh Circuit.

The case most analogous to the present action is Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525 (9th Cir. 1983). There, the Ninth Circuit rejected the district court's holding that because the proposed intervenor, the Audubon Society, had no legal interest in the land which was the subject matter of the suit, it lacked sufficient interest for intervention. The Ninth Circuit first recognized that a public interest group is entitled as a matter of right to intervene in actions challenging the legality of measures which the group has supported. Id. at 527 (citing Washington

State Building & Construction Trades v. Spellman, 684 F.2d 627 (9th Cir. 1982), cert. denied sub nom. Don't Waste Washington Legal Defense Foundation v. Washington, 461 U.S. 913 (1983); Idaho v. Freeman, 625 F.2d 886 (9th Cir. 1980)). The Sagebrush court went on to hold that because "[a]n adverse decision in this suit would impair the Society's interest in the preservation of birds and their habitats," the very reason for the Society's creation and existence, the Society possessed sufficient interest to intervene. Sagebrush, 713 F.2d at 527.

Such "nonlegal" interests in disputed property or transactions have been recognized as sufficient for intervention by other circuit and district courts. Nuesse v. Camp, 385 F.2d 694 (D.C. Cir. 1967) (state banking commissioner allowed to intervene in action which could result in federal sanction of a bank in

commissioner's state); West Virginia Highlands Conservancy, Inc. v. Watt, 32 Fed. R. Serv. 2d (Callaghan) 1462 (N.D.W. Va. 1981) (specific legal or equitable interest in the chose is not required); United States v. Reserve Mining Co., 56 F.R.D. 408 (D. Minn. 1972) (the right of environmental groups to intervene must be viewed in light of the interest which they seek to represent as well as in light of the nature of the particular litigation). In none of these cases was the proposed intervenor required to have a narrow legal or equitable interest in the property or transaction at issue.

Intervention involves an accomodation between two potentially conflicting goals: "to achieve judicial economies of scale by resolving related issues in a single lawsuit, and to prevent the single lawsuit from becoming fruitlessly

complex or unending." Smuck v. Hobson, 408 F.2d 175, 179 (D.C. Cir. 1969). In Smuck, Chief Judge Bazelon suggests that in balancing these goals "the first requirement of Rule 24(a)(2), that of an 'interest' in the transaction, may be a less useful point of departure than the second and third requirements, that the applicant may be impeded in protecting his interest by the action and that his interest is not adequately represented by others." Id.

Courts subscribing to this approach have done so because they view the "interest" test as a threshold rather than the determinative criterion for intervention. Id.; Nuesse, 385 F.2d at 700; County of Fresno v. Andrus, 622 F.2d 436, 438 (9th Cir. 1980).

Such an approach to determining intervention of right has its foundation in the 1966 amendment of Rule 24. As

stated by Professor Benjamin Kaplan, draftsman of the amendment, "[t]he changed wording of the Rule was intended . . . to drive beyond the narrow notion of an interest in specific property." Kaplan, Continuing Work of the Civil Committee: 1966 Amendment of the Federal Rules of Civil Procedure (I), 81 Harv. L. Rev. 356, 405 (1967). Professor Kaplan emphasizes that:

> New Rule 24(a)(2) invites us to see that the practical consequence to the applicants of being denied intervention is that they cannot stop a settlement nor, if dissatisfied with the decree entered after consent, press their contention on appeal; they are remitted, instead, to subsequent independent private actions in which it would be hard (although not impossible) to induce the courts to grant them better relief than was accorded by the settlement. This factor can weigh for intervention; it is a matter for consideration from case to case.

Id.

This change in the wording of the Rule suggests that courts should read "interest" more broadly and shift their scrutiny to the questions of whether the interest will be impeded by the proceeding's outcome and whether the interest is adequately represented by existing parties.

The amended language of Rule 24(a) was applauded as a directive to eliminate "the temptation or need for tangential expeditions in search of 'property' or someone 'bound by a judgment.'" Smuck, 408 F.2d at 179. As Judge Bazelon cautioned: "It would be unfortunate to allow the inquiry to be led once again astray by a myopic fixation upon 'interest.'" Id.

This amicus curiae submits that the court below has indeed gone astray in its preoccupation with identifying a legal

"interest" of the Council to warrant intervention. Unquestionably, the Council has a significant and substantial interest in seeing that the Secretary of Interior complies with Congress' directive to condemn and purchase the land in question for inclusion in the Indiana Dunes National Lakeshore. Indeed, it is fair to say that if it were not for the Council's diligent efforts over the span of 30 years and in particular its sponsorship of the very bill mandating purchase of the land, there would be no judicial proceeding in which to intervene.

Clearly, the Council's interest in the property at issue meets the threshold required for intervention.

Certainly, the Secretary should not be allowed to flout his legislative mandate to the specific detriment of the Council, without the Council being

allowed to speak. United States v. 36.96 Acres of Land, 754 F.2d at 862 (Cudahy, J., dissenting). Further, individuals and groups such as the Council and the amicus should not be arbitrarily deprived of the right to intervene in a proper case because of a technical and overly restrictive interest requirement. The Council's history and its nexus with the property at issue are clear. Its interest is worthy of protection. To recognize that its interest is "demonstrable," id. at 859, but not "legally protectable" is an artificial distinction. As modern Rule 24 is intended to remove artificial barriers to entry of litigants in appropriate cases, the barriers erected by the Seventh Circuit should be removed as well.

CONCLUSION

Because the Seventh Circuit decision below is contrary to decisions of this Court and other Circuits and undermines the purpose of Rule 24, the petition for a writ of certiorari submitted by Save The Dunes Council, Inc. (No. 85-426) should be granted.

Respectfully submitted,

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CERTIFICATE OF FILING

CERTIFICATE OF SERVICE

Pursuant to Sup. Ct. R. 28.5(b), I, Paul J. Knapp, a member of the Bar of the Court, representing Sierra Club, the amicus herein, hereby certify that on the 15th day of November, 1985, in accordance with Sup. Ct. R. 28.2 and 28.3, I deposited in the United States Post Office located at the Federal Building, 46 East Ohio Street, Indianapolis, Indiana 46204, with first class postage prepaid, one original and 40 photostatic copies of amicus Sierra Club's Motion for Leave to File Brief of Sierra Club as Amicus Curiae Supporting Petitioner and Brief of Sierra Club as Amicus Curiae Supporting Petitioner, addressed to the Clerk of the United States Supreme Court for filing and further by the same method served three photostatic copies of the same to the following counsel:

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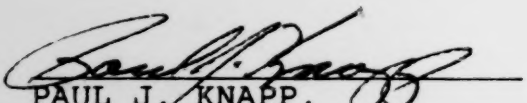

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